RECEIVED
OCT 26 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-5837

ROY GLEN SWINK,
Appellant

VS.

STATE OF TEXAS,
Respondent

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

BROWN, HARDING, FARGASON & BROWN
1601 Broadway
Lubbock, Texas 79401

Attorneys for Appellant

TABLE OF CONTENTS

PAGE

Opinion Below----------1

Jurisdiction----------1-3

Constitutional and Statutory Provisions Involved----------3

Questions Presented----------3-4

Statement----------4-6

How The Constitutional Questions Were Raised And Decided Below----------6-9

The Federal Questions Presented are Substantial----------10-16

I. THE ADMISSION INTO EVIDENCE OF THE HEARSAY PORTIONS OF THE DIAGNOSTIC STUDY, PURSUANT TO §54.02(a) OF THE TEXAS FAMILY CODE, DENIED APPELLANT DUE PROCESS OF LAW AND THE RIGHT TO CONFRONT THE ABSENT WITNESSES, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.------16-25

II. THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE CONSTITUTIONALLY PROTECTED PRESUMPTION OF INNOCENCE IS NOT APPLICABLE TO THE TRANSFER HEARING.----------25-31

Conclusion and Prayer----------31

Certificate of Service----------31

Appendix----------1a-10a

INDEX OF AUTHORITIES

PAGE

Bell v. Wolfish, 99 S.Ct. 1861 (1979)----------13,29

California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)----------17,18,24

Clemons v. State, 317 N.E.2d 859 (Ind.Ct.App.3rd Dist., 1974), cert. den'd, 423 U.S.859, 96 S.Ct. 113, 46 L.Ed.2d 86 (1977)----------12,20

Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895)----------27

Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)----------13,29

Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)----------11,21

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)----------11,20

Gault, In Re, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)----------11,14,15,19,20, 21,23

Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400 (1959)----------11,21

G.R.L. v. State, 581 S.W.2d 536 (Tex.Civ.App. - Dallas 1979----------12,15

J.R.C., Matter of, 551 S.W.2d 748 (Tex.Civ.App. - Texarkana 1977, writ ref'd n.r.e.)----------18

Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966)----------10,12,15,16,21, 22,23,26,27,29,3

Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895)----------24

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971)----------19,29

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)----------11,21,23,26

Murphy, In Re, 15 M.D. App. 434, 291 A2d 867 (Md. 1972)----------12

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)----------10,18,19,22

R.E.M. v. State, 541 S.W.2d 841 (Tex.Civ.App. - San Antonio 1976, writ ref'd,n.r.e.----------15,23,27

R.G.S., In Re, 575 S.W.2d 113 (Tex.Civ.App. - Eastland 1978)----------7,9,11,15,20, 26,28

State v. Carmichael, 35 Ohio St.2d 1, 298 N.E.2d 568 (1973), cert. denied, 414 U.S. 1161, 94 S.Ct. 922, 39 L.Ed.2d 113 (1974)----------12

State v. Piche, 74 Wash.2d 9, 442 P.2d 632 (1968), cert. denied 393 U.S. 1041, 89 S.Ct.666, 21 L.Ed.2d 588 (1969)----12

Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)----13,28

Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1929)----20

Winship, In Re, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 1019 (1967)----13,14,20,21,28

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)----11

Tex.Fam.Code Ann. §54.02(d) (1975)----5,6

Tex.Fam.Code Ann. §54.02(e) (1975)----1,3,4,5,6

Tex.Fam.Code Ann. §54.02(f) (1975)----1,2,3,4,6,8, 9,12

Tex.Fam.Code Ann. §54.02(h) (1975)----27

TEX.R.CIV.P. 483----7,16

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1979

NO. _____

ROY GLEN SWINK,
Appellant,

VS.

STATE OF TEXAS,
Respondent.

On Appeal From The Supreme Court of Texas

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, at Eastland, is reported at 575 S.W.2d 113 (1978) and is set forth in the Appendix, infra, pp. 1a - 8a. The Supreme Court of Texas at Austin denied Appellant's Application for Writ of Error, without opinion, pursuant to TEX. R. CIV. P., Rule 483.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of Tex. Family Code Ann. §§54.02(e) and 54.02(f), (2) and (6), on the ground that they are repugnant to the Constitution of the United States.

At a hearing on the State's Petition for Waiver of Juvenile Court Jurisdiction, the Trial Court admitted into evidence and considered, a diagnostic study authorized by

§54.02(e) of the Texas Family Code, which included hearsay statements of absent witnesses. Petitioner's objection that this was a denial of the Sixth Amendment right of confrontation the admission of this evidence was overruled by the Juvenile Court. Also Petitioner's objection to the court's use of TEX. FAMILY CODE ANN. §54.02(f), subparagraphs (2) and (6) as a denial of Petitioner's presumption of innocence and a denial of due process was overruled. The Juvenile Court waived its exclusive jurisdiction and transferred the Petitioner to District Court for trial as an adult in criminal pleadings. Petitioner was subsequently tried and convicted of murder. He was sentenced to confinement in the custody of the Texas Department of Corrections for a term of 45 years.

On December 14, 1978, the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, sitting at at Eastland, affirmed the order of the Juvenile Court waiving exclusive juvenile jurisdiction of Appellant and transferring Appellant to District Court. On January 4, 1978, Appellant's Motion for Rehearing was overruled by the Court of Civil Appeals. Appellant made timely application for writ of error to the Supreme Court of Texas at Austin. On May 30, 1979, the Supreme Court of Texas refused Appellant's Application for Writ of Error without opinion stating that there was no reversible error. Petitioner filed a Motion for Rehearing in the Texas Supreme Court on June 14, 1979. This motion for rehearing was overruled by the Supreme Court of Texas on September 25, 1979, without opinion. Timely notice of appeal to this Court was filed in the Supreme Court of Texas at Austin on December 20, 1979. As the Supreme Court of Texas at Austin rejected Petitioner's challenge to Tex. Family Code Ann. §§54.02(e) and (f), this matter is appropriately brought to this Court by appeal.

In the event that the Court does not consider

appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States. This case also involves Tex. Family Code Ann. §54.02(e) and §54.02(f)(2)(6), which state:

> (e) At the transfer hearing the court may consider written reports from probation officers, professional consultants in addition to the testimony of witnesses. At least one day prior to the transfer hearing, the court shall provide the attorney for the child with access to all written matter to be considered by the court in making the transfer decision. The court may order counsel not to reveal items to the child or his parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future.
>
> (f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:
>
> . . . . . .
>
> (2) whether the alleged offense was committed in an aggressive and premeditated manner;
>
> . . . . . .
>
> (6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

QUESTIONS PRESENTED

1. Whether as a matter of due process, the Sixth and Fourteenth Amendments of the United States Constitution guarantee Appellant a right to confront and cross-examine witnesses against him in a hearing on the State's Petition for Waiver of Exclusive Juvenile Jurisdiction of the Appellant and Transfer to District Court for Criminal Proceedings,

pursuant to §54.02 of the Texas Family Code, and, if so, whether the introduction into evidence of hearsay statements of absent witnesses, contained within a diagnostic study authorized by §54.02(e) of the Texas Family Code denied Appellant due process and the right to confront such absent witnesses. (Drawing into question the validity of §54.02(e) of the Texas Family Code on the grounds that it is repugnant to the Constitution of the United States.)

2. Whether the Federal constitutional presumption of innocence applies to a juvenile respondent charged with violation of a State penal statute, in a hearing on the State's Petition for Waiver of Exclusive Juvenile Jurisdiction and Transfer to District Court for Criminal Proceedings, pursuant to §54.02 of the Texas Family Code, and if so, whether §54.02(f)(2) and (6) of the Texas Family Code denies Appellant due process of law in violation of the Fourteenth Amendment, by assuming the guilt of the Appellant. (Drawing into question the validity of §54.02(f)(2) and (6) of the Texas Family Code on the ground that it is repugnant to the Constitution of the United States.)

STATEMENT

On January 24, 1978, Appellant's father, stepmother and younger brother were shot and killed (Tr. 95). Three days later, Petitioner was detained and held in custody to answer the charge giving use to the case (Tr. 95-96). The State of Texas filed a petition on January 30, 1978, in the District Court of Stonewall County, sitting as a juvenile court, alleging that Petitioner unlawfully, intentionally and knowingly caused the death of Hermon Welon Swink, Ilka Ilene Swink, and Royce Wayne Swink (Tr. 1). On February 22, 1978, the Juvenile Court ordered the Juvenile Office of Taylor County, Texas, to make a complete diagnostic study, social evaluation, and full investigation of the child, his

circumstances, and the circumstances of the alleged offense pursuant to §54.02(d) of the Texas Family Code (Tr. 10). On March 13, 1978, the State filed its petition requesting the juvenile court to waive its exclusive juvenile jurisdiction and transfer the cause to the appropriate District Court in Stonewall County in accordance with §54.02, Texas Family Code (Tr. 19-21). On May 26, 1978, the Juvenile Court conducted the waiver hearing of which Appellant complains in the case. By an order dated June 1, 1978, the District Court waived jurisdiction and ordered that Appellant be transferred to the District Court of Stonewall County for criminal proceedings and trial as an adult (Tr. 85). At this waiver hearing the Court admitted into evidence the a social and diagnostic study tendered as evidence by the State under §54.02(e) of the Texas Family Code (S.F. 78-79). This report consisted of a social history (S.F. 76-77), a psychological report (S.F. 77), the psyciatric report prepared by a psychiatrist (S.F.77), and a physical examination (S.F.77). Appellant objected to the admission of this report as a denial of his constitutional rights of confrontation of witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution (S.F. 80). The Court overruled the Appellant's constitutional objection to this diagnostic study and admitted it into evidence. The Appellant appealed to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, sitting at Eastland, Texas. The Court of Civil Appeals affirmed the judgment of the Trial Court. Appellant petitioned the Supreme Court of Texas to issue a Writ of Error to review the judgment of the Court of Civil Appeals. The Supreme Court of Texas refused the Writ pursuant to Rule 483, Texas Rules of Civil Procedure, noting that there was "no reversible error" in the lower court. Appellant's Motion for Rehearing in the Supreme Court of Texas was

overruled on September 25, 1979.

HOW THE CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

At each stage of the proceedings in this case, the Appellant has objected that the Trial Court denied him the opportunity to confront and cross-examine the witnesses against him in the waiver hearing, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. This objection was made at the earliest opportunity in the Trial Court, and overruled; was presented in the Court of Civil Appeals and the Supreme Court of Texas and each time overruled. At each stage of the proceedings in this case the Appellant has contended that the application of §54.02(f)(2) and (6), denied him due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by presuming his guilt of the offense alleged. By special exceptions in his original answer, and trial objection, the Appellant objected to the application of this statute. Appellant's objection was overruled by the Trial Court, the Court of Civil Appeals and the Supreme Court of Texas.

At the time of the hearing on the State's PETITION REQUESTING THE JUVENILE COURT TO WAIVE ITS JURISDICTION, on May 26, 1978, the Appellant, objected to the hearsay portions of the diagnostic study prepared by the probation officer pursuant to §54.02(d), and admitted in evidence pursuant to §54.02(e) of the Texas Family Code. (S.F. 80). The Appellant specifically objected that the diagnostic study "P-1 denies the Child-Respondent his constitutional right of confrontation of witnesses against him as guaranteed to him by the Sixth Amendment to the Constitution of the United States." (S.F. 80). Although counsel persisted in this objection, the Trial Court overruled the objection, and admitted the

offending diagnostic study into evidence.

The Appellant appealed this decision to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, sitting at Eastland, intending that "THE ADMISSION INTO EVIDENCE OF THE HEARSAY PORTIONS OF THE DIAGNOSTIC STUDY DENIED APPELLANT DUE PROCESS OF LAW AND THE RIGHT TO CONFRONT THE ABSENT WITNESSES, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES." (Appellant's Brief, Page 2). The Court of Civil Appeals overruled the Appellant's Complaint of this constitutional violation, ruling that "The Sixth Amendment right applies specifically to criminal prosecutions and was not applicable to a waiver hearing." In Re R.G.S., 575 S.W.2d 113 at 117-118 (Tex.Civ.App.-Eastland, 1978). Appellant's Motion for Rehearing in the Court of Civil Appeals was overruled and Appellant petitioned the Supreme Court of Texas for a Writ of Error.

In his Application for Writ of Error in the Supreme Court of Texas, Appellant contended that "THE COURT OF CIVIL APPEALS ERRED IN AFFIRMING THE ADMISSION INTO EVIDENCE OF THE HEARSAY PORTIONS OF THE DIAGNOSTIC STUDY", and that such error was a constitutional error in violation of the Sixth and Fourteenth Amendments to the Constitution. The Supreme Court of Texas refused to issue its Writ of Error, ruling that the opinion of the Court of Civil Appeals contained no reversible error. The effect of the Supreme Court's refusal to grant its Writ of Error, accompanied by the notation "No reversible error", is to affirm the lower court judgment, and means that "The Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the Application presents no error which requires reversal". TEX. R. CIV. P. 483.

In its PETITION REQUESTING THE JUVENILE COURT TO

WAIVE ITS JURISDICTION, the State of Texas, in Paragraph V thereof, specifically plead provisions of §54.02(f)(2) and (6), of the Texas Family Code, stating

> In its determination the Court should consider the following facts:
>
> > The offense is against the person and was committed in an aggressive and premeditated manner; . . .
> >
> > The prospects of adequate protection of the public and a likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available to the juvenile court requires his being treated as an adult. (Tr. 20).

In Paragraph II of CHILD RESPONDENT'S ORIGINAL ANSWER, the Appellant, objected and specially excepted to Paragraph (a) of Paragraph V of the State's Petition wherein it alleged that "in this determination the Court should consider the following facts: (a) the offense is against the person and was committed in an aggressive and premeditated manner;". (Tr. 73). Further, in Paragraph III of his ORIGINAL ANSWER, the Appellant objected and specially excepted to the allegations of Paragraph (e) of Paragraph V of the State's Petition, wherein it was alleged that "in its determination the Court should consider the following facts: . . . (e) the prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child by use of the procedures, services, and facilities currently available to the Juvenile Court requires his being treated as an adult;". (Tr. 74). The Trial Court overruled these special exceptions and objections of the Appellant, and proceeded to specifically consider the objectionable portions of §54.02(f) of the Texas Family Code, thereby denying the Appellant the due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, by assuming his guilt of the offense with which he is charged in this case. (Tr. 84-85).

Appellant appealed this ruling to the Court of Civil Appeals, and complained that "TEXAS FAMILY CODE ANNOTATED SECTIONS 54.02(f)(2) AND (6), BY THEIR OWN TERMS, AND BY THE JUVENILE COURT'S APPLICATION THEREOF, PRESUME THE GUILT OF THE CHILD RESPONDENT, CONTRARY TO HIS CONSTITUTIONALLY PROTECTED RIGHT TO THE PRESUMPTION OF INNOCENCE, AND DUE PROCESS RIGHT TO BE PRESUMED INNOCENT OF THE CHARGES AGAINST HIM." (Appellant's Brief, Page 33-39). The Court of Civil Appeals overruled the Appellants Point, stating that "[t]he presumption he urges is not applicable to the transfer hearing." In Re R.G.S., 575 S.W.2d 113 at 120 (Tex.Civ.App.-Eastland, 1978). Appellant's Motion for Rehearing in the Court of Civil Appeals was overruled without opinion, and thereafter the Appellant petitioned the Supreme Court of Texas for a Writ of Error.

On appeal in the Supreme Court, the Appellant Contended that "THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE CONSTITUTIONALLY PROTECTED PRESUMPTION OF INNOCENCE IS 'NOT APPLICABLE TO THE TRANSFER HEARING'". (Appellant's Brief, Page 28). The Supreme Court refused to issue a writ of error on this complaint. Appellant's Motion for Rehearing in the Supreme Court of Texas was overruled without opinion on September 25, 1979.

As demonstrated by this review of the proceedings, the Appellant has raised the constitutional objections and questions here presented, at every stage of the proceeding, from the trial of the waiver hearing through the court of last resort in Texas. In each instance and each court, the Appellant has presented the exact constitutional question presented in this appeal. In each court, the Court has specifically ruled on the constitutional questions presented, and overruled Appellant's contentions.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

As construed by the Court of Civil Appeals, and affirmed by the refusal of the Texas Supreme Court to issue its Writ of Error, §54.02(e) of the Texas Family Code authorizes the introduction of hearsay statements of out-of-court witnesses against a juvenile Respondent and denies the Child Respondent the opportunity to confront and cross-examine these absent witnesses, in a "critically important" waiver hearing, which could result in denying the child the benefit of the exclusive jurisdiction of the Juvenile Court, its services, facilities and personnel, and subject him to "the imposition of criminal sanctions." cf. Kent v. United States, 383 U.S. 541, 86 S.Ct.1045, 16 L.Ed.2d 84 (1966). The question involved in this case is the applicability of the right of confrontation and the applicability of the presumption of innocence, in such a "critically important" waiver hearing.

This appeal involves questions falling within three areas of concern which this Court has previously deemed to give rise to substantial Federal questions, to-wit: 1) the right to confront and cross-examine absent witnesses, and the applicability of such right to various proceedings and hearings; 2) the nature and operation of the presumption of innocence and burden of proof in criminal and juvenile jurisprudence, and the proceedings in which such presumption applies; and 3) the process which is due to a Child Respondent in juvenile hearings.

This Court has previously determined that the right to confront and cross-examine witnesses is "a fundamental right" applicable to the States as a matter of due process by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). This Court previously deemed the question of the applicability of the right of confrontation to State criminal proceedings to be a

substantial Federal question giving rise to the grant of certiorari in Pointer v. Texas, supra. This Court also considered the applicability of the right of confrontation to a parole revocation or probation revocation hearing to be a substantial Federal question justifying a grant of writ of certiorari in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). This Court also ruled that the applicability of the confrontation right to administrative hearings was a substantial Federal question giving rise to the grant of this Court's Writ of Certiorari in Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400 (1959). This Court recognized the substantial Federal question in the case of Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) questioning the applicability of the right to confrontation in a disciplinary prison proceeding. In Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Court determined that a substantial Federal question was raised when a trial judge imposed the death sentence on the basis of a pre-sentence report containing confidential information which was not disclosed to the defendant or his counsel and which the defendant had no opportunity to deny or explain. In the case of In Re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 2527 (1967), the Court examined the substantial Federal question of the applicability of certain due process rights, including the right to confrontation, in a juvenile adjudication hearing. Clearly these cases, demonstrating the long-standing, continuous and recent concern of this Court with the application of the Sixth Amendment right to confrontation, further demonstrate that this appeal, questioning the applicability of the right to confrontation in a juvenile waiver hearing, raises a substantial Federal question.

While the case of Kent v. United States, supra,

partially discussed the process which is due in a juvenile waiver hearing, the question presented by this appeal is the question specifically left unanswered by the Court's opinion in Kent, supra, and the Court's denial of certiorari in the case of Clemons v. State of Indiana, 162 Ind. App. 50, 317 N.E.2d 859 (1974) Cert. denied, 423 U.S. 859, 96 S.Ct. 113, 46 L.Ed.2d 86 (1975). Since this Court denied a Petition for Writ of Certiorari in the Clemons case, numerous State courts have followed and cited the Clemons case as authority for the denial of the right to confront and cross-examine witnesses in a juvenile waiver hearing. Several state courts have concluded that juvenile waiver hearings are dispositional and that the hearsay rules do not apply to such a hearing. See In Re Murphy, 15 M.D. App. 434, 291 A2d 867 (Md. 1972); State v. Piche, 74 Wash.2d 9, 442 P.2d 632 (1968), cert. denied 393 U.S. 1041, 89 S.Ct. 666, 21 L.Ed.2d 588 (1969); State v. Carmichael, 35 Ohio St.2d 1, 298 N.E.2d 568 (1973), cert. denied, 414 U.S. 1161, 94 S.Ct. 922, 39 L.Ed.2d 113 (1974); G.R.L. v. State, 581 S.W.2d 536 (Tex.Civ. App. - Dallas 1979). While the denial of the petition for writ of certiorari in the Clemons case was an exercise of this Court's discretion, and not a ruling upon the merits of the case, the Court's silence on this matter and continued lower court reliance upon the Clemons case has given rise to a substantial Federal question involved in this direct appeal pursuant to Title 28, §1257, United States Code.

This appeal presents the further substantial Federal question of the applicability of the presumption of innocence to a waiver hearing pursuant to §54.02(f) of the Texas Family Code. The Court of Civil Appeals, affirmed by the Texas Supreme Court, has ruled that the presumption of innocence has no application to a waiver hearing in Juvenile Court pursuant to §54.02 of the Texas Family Code.

On several occasions this Court has determined

that the nature and application of the presumption of innocence, and the constitutionally required burden of proof in juvenile and criminal cases, are substantial Federal questions. This Court has stated that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, supra, at 503, 96 S.Ct. at 1692. "[T]he presumption of innocence and the prosecution's burden of proof are logically similar. Taylor v. Kentucky. 436 U.S. 478, 98 S.Ct. 1930 at 1934, 56 L.Ed.2d 468 (1978). Since the constitutionally mandated burden of proof in juvenile and criminal matters is beyond a reasonable doubt, In Re Winship, supra, and "the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials,' Bell v. Wolfish, supra, it is clear that the two rules address the same question. The reasonable doubt standard "provides concrete substance for the presumption of innocence --that bedrock 'axiomatic and elementary' principal whose enforcement lies at the foundation of the administration of our criminal law." In Re Winship, supra, at 1072. This Court determined that the burden of proof in juvenile and adult cases was a substantial Federal question in In Re Winship, supra. This Court also determined that the applicability of the presumption of innocence to a pre-trial detainee was a substantial Federal question, causing this Court to grant its Writ of Certiorari in Bell v. Wolfish, supra. And in Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), this Court perceived a substantial Federal question in a complaint that Texas trial procedures diluted the constitutional presumption of innocence. Clearly, these cases indicate the long standing, continuing and recent concern of this Court with the presumption of innocence, and the proceedings in which it applies. Because the Court of Civil Appeals and the Texas Supreme Court have

ruled that the presumption of innocence, "a basic component of a fair trial under our system", is not applicable to a waiver hearing under §54.02 of the Texas Family Code, this case presents a substantial Federal question.

Section 54.02(f) of the Texas Family Code is substantially the same in all relevant matters to §34 of the Uniform Juvenile Court Act, which authorizes discretionary waiver of jurisdiction and transfer of the child defendant, and which has been adopted by several states. In addition, numerous other states have analogous statutory provisions which are either identical to the Texas statute, vary from it in wording only, or are in substance identical to the provisions of §54.02(f) of the Texas Family Code. The question of the applicability of the right to confrontation and the presumption of innocence in such a juvenile waiver hearing would have far-ranging, nationwide application and would effect the application of state statutes, and the process observed by the states in juvenile waiver hearings throughout the nation.

On several occasions this Court has found that juvenile court proceedings have given rise to substantial Federal questions which required a grant of the writ of certiorari or notation of probable jurisdiction. In In Re Gault, supra, this Court noted a substantial Federal question concerning the process which is due in a juvenile adjudication hearing. The Court held that "absent a valid confession adequate to support the determination of a juvenile court, confrontation and sworn testimony by witnesses available for cross-examination are essential to a finding of 'delinquency' . . . ." In Re Gault, supra, at 1459. The Court in Gault specifically held that the right of confrontation and cross-examination of witnesses applies to a juvenile adjudication hearing. In the case of In Re Winship, supra, the Court perceived a substantial Federal question and

granted its Writ of Certiorari to determine the standard of proof in juvenile and criminal prosecutions. In Kent v. U.S., supra, this Court specifically concerned itself with the process which is due a child respondent in a juvenile waiver hearing such as that provided by §54.02 of the Texas Family Code. While the Court in Kent did not squarely address the right of confrontation in such a hearing, the Court did determine that the waiver hearing is an "critically important" action determining vitally important rights of the juvenile; that the right to counsel under the Sixth Amendment attached to such a proceeding as a matter of due process, and emphasized that one of the purposes of counsel is the confrontation and cross-examination of witnesses against the juvenile in a waiver hearing. The Court stated that "[t]hese rights are meaningless - an illusion, a mockery - unless counsel is given an opportunity to function." Kent, supra, at 1057. While the Court in Kent failed to address the question presented by this appeal, nevertheless Kent, Gault and Winship all display this Court's continued and recent concern with the process which is due in juvenile proceedings, including the right to confront witnesses, and these cases demonstrate that this appeal raises a substantial Federal question.

There is even a direct conflict and split of authority in Texas over the very question presented here. In this case, In Re R.G.S., 575 S.W.2d 113 (Tex.Civ.App.-Eastland 1978), the Eastland Court of Civil Appeals refused to recognize the right of confrontation and cross-examination in a juvenile waiver hearing. In G.R.L. v. State, 581 S.W.2d 536 (Tex.Civ.App.-Dallas 1979) the Dallas Court of Civil Appeals expressly rejected the claim that the right of confrontation applies to a juvenile waiver hearing. But in R.E.M. v. State, 541 S.W.2d 841 (Tex.Civ.App.-San Antonio 1976) the San Antonio Court of Civil Appeals refused to

allow the admission of prior recorded hearsay testimony in a juvenile waiver hearing, citing Kent v. U.S., supra. In each case, the Supreme Court of Texas refused Writ of Error, stating in each case that there was "no reversible error" in the lower court opinion, see Tex. R. Civ. P. Rule 483, even though these cases are in direct conflict, one with the other, on the very question here presented.

This appeal raises substantial Federal questions under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and for this reason, probable jurisdiction should be noted in this appeal.

I.

THE ADMISSION INTO EVIDENCE OF THE HEARSAY PORTIONS OF THE DIAGNOSTIC STUDY, PURSUANT TO §54.02(a) OF THE TEXAS FAMILY CODE, DENIED APPELLANT DUE PROCESS OF LAW AND THE RIGHT TO CONFRONT THE ABSENT WITNESSES, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

At the hearing on the Appellee's Petition for Waiver of Jurisdiction and Transfer to District Court, the State presented the witness Joyce Talbot, Juvenile Probation Officer. In addition to the testimony of Mrs. Talbot, the State entered into evidence the diagnostic report prepared in part by Mrs. Talbot and her associates of the Taylor County Juvenile Probation Office, and in part by the prosecutor's investigation. (S.F. 159-175; 79-99). The diagnostic study, on pages 162 through 169, included Mrs. Talbot's repetition of hearsay statements and reports of absent witnesses, which had been compiled by the investigator for the District Attorney's Office of Haskell County, Texas, and not by the witness Talbot. These reports included the statements of Dr. Lesley Serrano (S.F. 162), the statement of Grace Dasari, R.N. (S.F. 163), Betty Jane Patton (S.F. 164), Mrs. Jo McAnally (S.F. 165), Tammy McAnally (S.F. 166), Tom McAnally (S.F. 166), and the statement of Diane

Lambert (S.F. 167). Counsel for Appellant vehemently and specifically objected to the admission of the diagnostic study as a violation of the hearsay rules, and a denial of the due process and right to confrontation in violation of the Sixth and Fourteenth Amendments to the Constitution. (S.F. 79-99). The Trial Court overruled the Appellant's objection, to which action the Appellant in open court duly and timely objected and excepted. In admitting into evidence the hearsay portions of the diagnostic study, the Trial Court denied the Appellant due process of law and the right to confront the witnesses against him in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

Appellant complains in this Point of Error solely of the introduction into evidence of the statements of the witnesses contained on Pages 162 through 169 of the Statement of Facts, which includes the hearsay statements of laymen who were not court employees or professional consultants. Appellant does not complain of the introduction of the written reports of Edwin B. Headrick and Jim Ford, (S.F. 170-172), nor of the report of Dr. Kenneth Day (S.F. 173-174), nor the report of Dr. Irby Fox (S.F. 175).

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. California v. Green, 399 U.S. 149, 155, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489 (1970). On several occasions this Court has found violations of the right to confrontation even though the statements in issue were admitted into evidence under arguably recognized hearsay exceptions. California v. Green, supra; see Barber v. Page,

390 U.S. 719, 88 S.Ct. 1218, 20 L.Ed.2d 255 (1968); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

The summaries of the statements of the absent witnesses here complained of were undoubtedly hearsay under State law. In the Matter of J.R.C., 551 S.W.2d 748 (Tex.Civ. App.-Texarkana 1977, writ ref'd n.r.e.). Although the reports, being ex parte and made out of court, were hearsay, the Texas Legislature is free to create exceptions to the hearsay rule, and to provide for the reception of hearsay statements into evidence, and §54.02(e) of the Family Code creates such an exception. J.R.C., supra. However, in adopting new exceptions to the hearsay rule, and in altering the evidence admissible in its courts, the Legislature may not deny the Appellant due process of law and the right to confront the witnesses against him. California v. Green, supra. Given the similarity of the values protected by the hearsay rules and the right to confrontation of witnesses, the modification of a State's hearsay rules will often raise questions of incompatibility with the Defendant's constitutional right to confrontation. California v. Green, supra. The narrow question before this Court is whether the Appellant's constitutional right to be confronted with witnesses against him is necessarily inconsistent with the State's decision to change its hearsay rules, in juvenile waiver hearings, by the adoption of §54.02(e). Cf. California v. Green, supra, at 90 S.Ct. 1933.

In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), the United States Supreme Court held that the Sixth Amendment right of an accused to confront the witnesses against him is an essential and fundamental right and is applicable to the States through the Fourteenth Amendment. Juveniles are entitled to constitutional safeguards similar to those afforded adult defendants, including the right to confront and cross-examine adverse witnesses in

an adjudication hearing. In Re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The scope of juvenile due process, however, is not as extensive as that incident to criminal trials for adult criminal defendants. The guiding rule is one of fundamental fairness. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). However, since the Supreme Court in Pointer, supra, specifically held that the right to confrontation of witnesses is a fundamental right which is essential to a fair trial, and applicable to the States as a matter of constitutional due process, it follows that "fundamental fairness" requires that a juvenile defendant be accorded the right to confront and cross-examine witnesses against him. Indeed, In Re Gault, supra, specifically held that due process for a juvenile includes, among other rights, the Sixth Amendment right to confrontation of witnesses, and requires that any determination of delinquency be based upon sworn testimony subject to cross-examination. There can be no doubt at this late date that at least in a juvenile adjudication hearing, the juvenile defendant has the right to confront and cross-examine the witnesses against him, as a matter of constitutional due process. The Appellant contends that this right to confrontation and cross-examination of witnesses applies in a juvenile hearing in which a court determines whether to waive its exclusive juvenile jurisdiction and transfer a child to District Court.

Given the ruling of this Court in Gault, the question becomes whether or not there is a substantial difference in the nature of the adjudication hearing and the juvenile waiver hearing which will justify the admission of hearsay testimony and the denial of the right to confront witnesses in such a waiver hearing. The Court of Civil Appeals found such a substantial difference in the nature of the proceedings. The Court of Civil Appeals, adopting the

reasoning of the Clemons opinion, determined that the waiver hearing was "dispositional" in nature and analogous to a sentencing hearing in which the Court would be permitted to consider ex parte matters included within a presentencing report. The Clemons court, and the Court of Civil Appeals, placed great emphasis on the opinion of this Court in the case of Williams v. New York, 337 U.S. 241, 69 S.Ct.1079, 93 L.Ed.1337 (1929). The Court said that "[u]nlike the delinquency hearing, a waiver hearing is dispositional in nature". In Re R.G.S., supra, at 118. The Court went on to compare a waiver hearing to a sentencing hearing and stated that "[j]ust as in the judicial function of sentencing, consideration must be given to such factors as the previous record, background, and possibility for rehabilitation of the particular individual before the Court." These authorities are no longer controlling. The case of Williams v. New York, supra, the source of a great deal of the Court's reasoning and the basis of its distinction between adjudication and waiver hearings, was overruled by this Court in the case of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). In Gardner, this Court rejected the primary reliance on Williams v. New York, supra, distinguished the Williams case, and recognized that the passage of time justifies a re-examination" of the principles involved. Gardner v. Florida, supra, at 357, 97 S.Ct. at 1204.

The Eastland Court of Civil Appeals, relying upon the Clemons case, stated that the Sixth Amendment right of confrontation applies specifically to criminal proceedings and is not applicable to a waiver hearing. The Court of Civil Appeals fell into error in ruling that the Sixth Amendment right to confrontation applies only to criminal matters. In effect, the Court of Civil Appeals distinguished the procedures in question here from criminal prosecution by use of what Gault and Winship called the "'civil' label-of-

convenience which has been attached to juvenile proceedings." 387 U.S. at 50, 87 S.Ct. at 1459. But Gault and Winship expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. 387 U.S., at 50-51, 87 S.Ct., at 1455, 1456. This Court made clear in those decisions that civil labels do not obviate the need for criminal due process safeguards in juvenile courts. In Re Winship, supra, at 366, 90 S.Ct. at 1073 (1970). On several occasions this Court has held that the right to confront witnesses is an essential and fundamental right basic to due process, and not limited in its application to criminal proceedings. This Court has held that parole revocation hearings, and likewise, probation revocation hearings, are not criminal proceedings, but that an accused person nevertheless enjoys the right to confront and cross-examine witnesses in such hearings as a matter of constitutional due process. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct.2593, 33 L.Ed.2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct.1756, 36 L.Ed.2d 656 (1973). In Greene v. McElroy, 360 U.S. 474, 79 S.Ct.1400 (1959), this Court held that the right of confrontation and cross-examination applies not only in criminal cases but in administrative and regulatory matters also. "It has spoken out not only in criminal cases, (citations omitted) but also in all types of cases where administrative and regulatory actions were under scrutiny." Green v. McElroy, supra, at 1414.

In Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), the Court partially determined the process which is due a juvenile in a waiver hearing. The Court held the juvenile defendant must be accorded the right to counsel in a waiver hearing, and held that the assistance of counsel in the "critically important" waiver hearing is essential to the proper administration of juvenile

proceedings. The court stated that "the need is even greater in the adjudication of waiver . . . since it contemplates the imposition of criminal sanctions." Kent v. United States, supra, at 86 S.Ct. 1056. After holding that the right to counsel attaches at a juvenile certification hearing, the court held that "these rights are meaningless - an illusion, a mockery - unless counsel is given an opportunity to effect function." Kent, supra, at 1057. Analyzing the critical role of defense counsel in a juvenile waiver hearing, the Court emphasized that one of the purposes of counsel is the confrontation and cross-examination of witnesses against the juvenile in a waiver hearing. After considering and discussing the process due a juvenile in a waiver hearing, the Supreme Court stated that,

> We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

Kent v. U.S., supra, at 86 S.Ct. 1057 (emphasis added). Since the waiver hearing "must measure up to the essentials of due process and fair treatment", Kent v. U.S., supra, and since the right of an accused to confront the witness is likewise a fundamental right obligatory on the States by the Fourteenth Amendment, and is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal", Pointer v. Texas, supra, it follows that, as a matter of due process, a juvenile has a constitutional right to confront and cross-examine the witnesses against him in a juvenile waiver hearing such as that provided under §54.02 of the Texas Family Code.

While Kent v. U.S., supra, has held that the waiver hearing is "a critically important stage of the proceedings, Texas courts consider such waiver hearing under §54.02 to be "the most critical proceeding" in a juvenile

case. R.E.M. v. State, 541 S.W.2d 841 (Tex.Civ.App. - San Antonio 1976, writ ref'd n.r.e.). Kent, supra, left no doubt that the requirements of due process applied to a waiver hearing. But Appellant concedes that "once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as a particular situation demands." Morrissey v. Brewer, supra, at 481, 92 S.Ct. at 2600. The Appellant contends that due process requires that he be afforded the right to confront and cross-examine the witnesses in such a waiver hearing. Certainly "fundamental fairness" requires that this "essential and fundamental right" be afforded to the Appellant in "the most critical proceeding" in a juvenile case, in which he could be denied the rights and benefits of exclusive jurisdiction of the juvenile court, its services, and facilities, and subjected to "the imposition of criminal sanctions". Kent v. U.S., supra, at 86 S.Ct. 1056. Considering the major benefits of the juvenile system which a juvenile could lose by reason of waiver and certification for trial as an adult, and the fact that this is the most critically important proceeding in Texas juvenile procedures, the defendant should at least have the right to confront and cross-examine the witnesses such as provided in an adjudication hearing. Cf. In Re Gault, supra.

The gravity of the constitutional error caused by the introduction of the hearsay reports complained of herein is even more evident when one considers the origin, sources, and purpose of the confrontation clause, and the vices it seeks to prevent. This provision of the Constitution intends to secure the accused and the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, to give

their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercises of the right of cross-examination. Mattox v. United States, 156 U.S. 237, 242, 39 L.Ed. 409, 410, 15 S.Ct. 337. The Supreme Court in California v. Green, supra, stated that

> the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys "would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e., the witnesses against him, brought before him face to face. * * *" California v. Green, supra, at 90 S.Ct. 1934.

The vice which the confrontation clause seeks to prevent, trial by deposition or affidavit, such as in the Star Chamber, is the exact and specific violation of which the Defendant complains in this case. Examination of the statements of Dr. Lesley Serrano, Nurse Grace Dasari, Betty Jane Patton, the McAnallys, Diane Lambert, and all of the matters contained between pages 162 and 169 of the Statement of Facts, and composing the portion of the diagnostic study to which Appellant objected, shows that those statements are themselves hearsay, and contain gossip, rumor, hearsay upon hearsay, conclusions of the witnesses, and personal opinions and conclusions. The Statements are unsworn, and do not even rise to the level or dignity of an affidavit or deposition. It is just this type of hearsay, gossip and rumor, and unreliable information which confrontation and cross-examination seeks to prevent and avoid. It is important to

note also that the statements complained of here were not given directly to Joyce Talbot who composed the diagnostic study. Rather, Mrs. Talbot's report contains summaries of reports and interviews conducted by employees of the District Attorney of Haskell County, the Appellee in this case. Mr. Beauchamp, the District Attorney's investigator, conducted most of the interviews recorded in the diagnostic study. However, Mr. Beauchamp's interviews with the witnesses are not produced. Rather, Mrs. Talbot merely summarized the written reports which Mr. Beauchamp made of his interview with the absent witnesses, and incorporated her summaries of those written reports into her diagnostic study. They constitute hearsay upon hearsay.

II.

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE CONSTITUTIONALLY PROTECTED PRESUMPTION OF INNOCENCE IS NOT APPLICABLE TO THE TRANSFER HEARING.

The State of Texas, in Paragraph V of its PETITION REQUESTING THE JUVENILE COURT TO WAIVE ITS JURISDICTION, pled the provisions of §54.02(f)(2) and (6), of the Texas Family Code, alleging that "In its determination the Court should consider" the matters set out in such sections of the statute. In Paragraph II of CHILD RESPONDENT'S ORIGINAL ANSWER, the Appellant objected and specially excepted to Paragraph (a) of Paragraph V of the State's Petition on the basis that the same presumed the guilt of the Child Respondent in violation of due process. Further, in Paragraph III of his ORIGINAL ANSWER, the Appellant objected and specially excepted to the allegations of Paragraph (e) of Paragraph V of the State's Petition, objecting that the same assumed the guilt of the Appellant and thereby denied him due process. In addition, the Appellant presented these constitutional questions by trial objection in the Waiver Hearing. The Trial Court overruled the Special Exceptions and Objections of the Appellant, and specifically proceeded to consider the

offending sections of the statute. (Tr. 84-85). By applying §54.02(f)(2) and (6) of the Texas Family Code, the Trial Court denied the presumption of innocence to this Appellant, assumed his guilt of the offense charged, and thereby denied him due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The Court of Civil Appeals overruled the Appellant's Points complaining of this denial of due process, stating that "[t]he presumption he urges is not applicable to the transfer hearing." In Re R.G.S., 575 S.W.2d 113 at 120 (Tex.Civ.App.-Eastland, 1978). On appeal in the Supreme Court, Appellant contended, as he does here, that "THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE CONSTITUTIONALLY PROTECTED PRESUMPTION OF INNOCENCE IS NOT APPLICABLE TO THE TRANSFER HEARING." The Supreme Court of Texas refused to issue a Writ of Error on this complaint, and overruled the Appellant's Motion for Rehearing.

Kent v. U.S., supra, established that the requirements of due process apply to a juvenile waiver hearing. However, "[o]nce it is determined that due process applies, the question remains what process is due. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, supra, at 481, 92 S.Ct. at 2600. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as the private interest that has been affected by governmental action." Morrissey v. Brewer, supra, at 481, 92 S.Ct. at 2600. This Court has already made "a determination of the precise nature of the government function involved, as well as the private interest" to be affected in a waiver hearing, in the Kent case. The Court in Kent stated that a waiver hearing "contemplates the imposition of criminal sanctions."

Kent, supra, at 558, 86 S.Ct. at 1956, and results in the involuntary loss of the "special rights and immunities" conferred on him as a result of the Juvenile Court's exclusive jurisdiction. Kent, supra, at 556, 86 S.Ct. at 1055. Waiver of jurisdiction by juvenile court results in transfer of the jurisdiction of the child to a court of general jurisdiction for trial and prosecution according to the Texas Code of Criminal Procedure. TEX. FAMILY CODE ANN. §54.02(h) (1974). It denies Appellant the privacy of hearings accorded to juveniles, and the services, facilities and personnel available to the juvenile court. The transfer of custody is an arrest. TEX. FAMILY CODE ANN. §54.02(h) (1974). It requires that Appellant post a bail bond to secure his liberty prior to trial. This Court has held that such transfer proceedings are "critical" stages in juvenile process. Kent, supra. The Texas Courts, after considering "the gravity of the determination to be made and its dire consequences on the youthful offender," have determined that "transfer proceedings must be characterized as the most critical stage of the juvenile court process." R.E.M. v. State, supra, at 845. "The stakes in a transfer proceeding are exceedingly high. R.E.M. v. State, supra, at 845. In view of the gravity of the determination to be made and its dire consequences on the offender," Appellant contends that the constitutionally mandated presumption of innocence applies at this stage of the juvenile proceeding.

> The presumption of innocence, although not articulated in the Constitution, is a basic component of fair trial under our system of criminal justice. Long ago this court stated:
>
> > "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 41, 491 (1895).
>
> To implement the presumption, courts must be alert to the factors that may undermine the fairness of

the fact-finding process. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976).

The presumption of innocence is a doctrine that allocates the burden of proof. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); Estelle v. Williams, supra. The standard of proof beyond a reasonable doubt "provides concrete substance for the presumption of innocence . . . ." In Re Winship, supra at 1072. The presumption of innocence and the prosecution's burden of proof are logically similar. Taylor v. Kentucky, supra, at 1934. In the case of In Re Gault, supra, and In Re Winship, supra, this Court has held that the presumption of innocence and the burden of proof beyond a reasonable doubt is applicable in a juvenile adjudication hearing. The Court of Civil Appeals ruled that "The 'presumption of innocence' principle urged by Appellant applies to 'adjudication' proceedings, but not to 'transfer' proceedings," relying on Winship, to persuade it of the inapplicability of the presumption to the waiver hearing. 575 S.W.2d at 120. The Court of Civil Appeals quoted this Court's opinion in Winship, for the proposition that, although the presumption of innocence applies to an adjudication hearing, that "there will be no effect on the procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing." In Re R.G.S., supra, at 120, quoting from In Re Winship, supra, at 367, 368, 90 S.Ct. at 1074. The Appellant contends that the Court's language in Winship was not, nor was it intended to be, a direct reference to a juvenile waiver hearing, and that the Court in Winship had no intention to specifically rule that the presumption of innocence is inapplicable to a juvenile waiver hearing.

Whether any procedural protections are due in any particular hearing depends upon the extent to which an individual will be "condemned to suffer grievous loss".

Morrissey v. Brewer, supra, at 481, 92 S.Ct. at 2600. Certainly, under the Due Process Clause, a person may not be punished prior to an adjudication of guilt in accordance with due process of law. Bell v. Wolfish, supra, at 1872. There is "grievous loss" if a child such as the Appellant is in fact transferred from the exclusive jurisdiction of the juvenile court for trial as an adult; he is denied the "special rights and immunities" of juvenile jurisdiction and may be subjected to the "imposition of criminal sanctions." Kent v. U.S., supra, at 1055, 1056. Therefore, this Court should be alert to any factors or processes which may tend to unfairly predispose the process or the fact-finder to an adverse determination resulting in waiver of jurisdiction and transfer of a juvenile to an adult court. Cf. Estelle v. Williams, supra. Certainly, the contemplation of the juvenile statutes is that waiver of jurisdiction should be the exception rather than the rule in such proceedings. Kent v. U.S., supra, at 560, 561, 86 S.Ct. at 1057. However, if the presumption of innocence is abandoned in such a hearing, and the child appellant is assumed to have committed the criminal offense alleged against him, human nature dictates even the most impartial fact-finder will "contemplate the imposition of criminal sanctions." Therefore, because §54.02(f)(2) and (6) of the Texas Family Code affirmatively assume that the child has committed the alleged criminal offense, the statutes thereby make the entire proceeding predisposed toward certification of the child for trial as an adult. This denies the child "fundamental fairness" in violation of due process. Cf. McKeiver v. Pennsylvania, supra. Surely any fact-finder would be more willing to impose criminal sanctions on a child he assumed to be guilty, than he would on a presumptively innocent child. To the extent that §54.02(f)(2) and (6) require the Court to assume the guilt of the defendant and

deny him the presumption of innocence, they thereby tilt the scales in favor of certification, which was intended as the exception rather than the rule in such proceedings.

The offending statutory provisions, Subsections (2) and (6) of §54.02(f), Texas Family Code, read as follows:

> (f) In making the determination required by subsection (a) of this section, the court shall consider, among other matters: . . . . . .
> (2) Whether the alleged offense was committed in an aggressive and premeditated manner . . . . . .
> (6) The prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by the use of the procedures, services, and facilities currently available to the juvenile court.

There are no words of qualification in Subdivision (2) to preserve the presumption of innocence. The statute does not allow for any possibility that the child might not be guilty of the commission of the offense. Instead, this statute affirmatively assumes that the child did in fact commit the offense, and only permits the juvenile court to examine and question the manner of its commission. The emphasis of this section is upon the manner of the commission, which must of course assume that there was in fact an offense committed to be examined. Therefore, section (2) affirmatively assumes the guilt of the child and denies him the presumption of innocence in violation of due process.

Subdivision (6) is a blatant assumption of the guilt of the child appellant. It is not necessary to consider "the prospects of adequate protection of the public and the likelihood of the rehabilitation" of a presumptively innocent child. If the child is presumed to be innocent, then there is in fact no need for either protection of the public or rehabilitation of the child. An innocent child is not in need of rehabilitation. The Court should note that subsection (6) of §54.02(f) of the Texas Family Code is verbatim identical Paragraph 8 of the rules of Court of the District of Columbia, adopted for such waiver hearings which came under consideration in Kent v. U.S., supra, with one major

exception. The D.C. statute included the parenthetical phrase "(if he is found to have committed the alleged offense)", which parenthetical phrase gave rise to and inserted the presumption of innocence in this statute. Kent v. U.S., supra, appendix at 1060. However, the Texas statute omits this parenthetical insertion of the presumption of innocence, and thereby assumes the guilt of the Appellant.

Because the offending statutes deny Appellant the presumption of innocence in violation of due process, the Court should note probable jurisdiction of this appeal, in order to consider this substantial Federal question.

CONCLUSION

FOR THE FOREGOING REASONS, PROBABLE JURISDICTION SHOULD BE NOTED.

Respectfully submitted,

BROWN, HARDING, FARGASON & BROWN
1601 Broadway
Lubbock, Texas 79401

Clifford W. Brown
Member of the Bar of the Supreme Court of the United States

Robert Michael Brown

Attorneys for Appellant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above Jurisdictional Statement has been served on all parties required to be served, by mailing same to Mr. Joseph Thigpen, District Attorney, Haskell County Courthouse, Haskell, Texas 79521, first class United States postage prepaid, on this the 21st day of December, 1979, in compliance with Rule 33, subsection 3(b) of the Rules of the Supreme

Court of the United States.

Clifford M. Brown
of Counsel

In re R.G.S.

No. 5229 -- Appeal from Stonewall County

On January 24, 1978, the father, stepmother, and younger brother of appellant, R.G.S., were shot and killed. Three days later, appellant was taken into custody and detained. The State of Texas filed a petition on January 30, 1978, in the 39th District Court of Stonewall County, sitting as a juvenile court, seeking an adjudication, pursuant to Section 54.03 of the Texas Family Code,[1] that appellant engaged in delinquent conduct or conduct indicating a need for supervision. The "adjudication" petition alleged that appellant unlawfully, intentionally, and knowingly shot and killed his father, stepmother, and brother. Appellant was summoned to appear at 2:30 p.m. on January 30, 1978, the date the petition was filed, to answer the allegations. On January 30, 1978, the court, following a hearing attended by appellant and his attorney, entered a detention order pursuant to Section 54.01. Appellant and his attorney filed written waivers of subsequent detention hearings. On February 22, 1978, the court ordered the Juvenile Office of Taylor County to make a complete diagnostic study, social evaluation, and full investigation of the appellant, his circumstances, and the circumstances of the alleged offense. On March 10, 1978, the court, pursuant to appellant's motion for an adjudication hearing, entered an order setting the "adjudication hearing" for March 20, 1978. On March 13, 1978, the State filed its petition requesting the juvenile court to waive its jurisdiction and transfer the cause to the appropriate criminal court in Stonewall County in accordance with Section 54.02, which provides in part:

> (a) The juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if:
>
> (1) the child is alleged to have violated a penal law of the grade of felony;
>
> (2) the child was 15 years of age or older at the time he is alleged to have committed the offense and no adjudication hearing has been conducted concerning that offense; and
>
> (3) after full investigation and hearing the juvenile court determines that because of the seriousness of the offense or the background of the child the welfare of the community requires criminal proceedings.

---

[1]All statutory references, unless otherwise noted, are to sections in the Texas Family Code.

On March 13, 1978, the court set the "waiver hearing" for March 17, 1978. On March 15, 1978, the court entered an order stating that on March 14, 1978, it learned that the State had filed its waiver of jurisdiction and transfer petition, and the court on such date, on its own motion, vacated the March 20, 1978, adjudication hearing setting. The court also denied appellant's request for a new "adjudication hearing" setting. Appellant sought, and was granted, three continuances of the transfer hearing. On May 26, 1978, the transfer hearing was held and by order dated June 1, 1978, the juvenile court waived jurisdiction and ordered the cause transferred to the District Court of Stonewall County for criminal proceedings.

Appellant appeals from the order waiving jurisdiction and transferring the cause. We affirm.

In his first point of error, appellant contends the court erred in denying him a speedy "adjudication hearing" in violation of the mandatory provisions of Section 53.05. We disagree. Section 53.05 provides that the court shall set the hearing, if the juvenile is in detention, not later than ten days after the petition is filed. The initial hearing was set within the statutory period.

Appellant's main complaint is that the court, on its own motion, had no authority to vacate the March 20, 1978, trial setting for the "adjudication hearing."

The rule that a hearing must be set, but not heard, within the ten-day provision, was discussed in Matter of J.R.C., 551 S.W.2d 748 (Tex.Civ.App. - Texarkana 1977, writ ref'd n.r.e.), as follows:

> Section 53.05 merely requires that the time initially set for the hearing be not later than 10 days after the filing of the petition. It does not preclude continuing the hearing by agreement or for good cause. Smith, Parent and Child, Tex. Family Code Symposium, 5 Tex.Tech.L.Rev. 551 (1974). As for the delays which occurred after the time initially set for the hearing, appellant participated in or was responsible for a considerable portion of those delays, and under the record presented here he is in no position to complain of them.

In the recent case of L.L.S. v. State, 565 S.W.2d 252 (Tex.Civ.App. - Dallas), writ ref'd n.r.e. per curiam, 569 S.W.2d 495 (Tex.1978), the court properly held that a juvenile court, on its own motion, could continue a hearing. The court said:

> We do not interpret section 53.05 as imposing a jurisdictional limitation requiring dismissal of the proceeding unless a proper waiver or ground for postponement is shown by the record. The requirement that a hearing be set within ten days after the filing of the petition is mandatory, but there is no jurisdictional requirement that the hearing be completed at that time. The requirement for a setting within ten days provides a time for appearance for both parties. The judge can then determine whether the child is adequately represented and what the future schedule of the case should be.

> Whether the hearing on the state's petition or on its motion to transfer is completed on that date or postponed is a matter within the court's discretion, subject to the constitutional requirement of a speedy trial. Respondent does not contend that the period of the delay in the present case was so long as to constitute a constitutional denial of due process apart from the provision of section 53.05 that a hearing be set within ten days. We construe the statute as permitting a postponement in the court's discretion and on the court's own motion, so long as the postponement is not for such a long period as to be a denial of due process.

We hold that the trial court, upon learning that the State had filed a waiver and transfer petition, did not abuse its discretion when it vacated, on its own motion, the previous order setting the "adjudication hearing" for March 20, 1978. We think that neither Rule 247 nor Rule 251, T.R.C.P., should prohibit a juvenile court from vacating, on its own motion under proper circumstances, a previously set date for an adjudication hearing. Moreover, appellant's complaint that the court erred in continuing or postponing the adjudication hearing, would have to be raised in the appeal of the adjudication proceeding. There has been no "adjudication" trial or appeal. Appellant has failed to show the court abused its discretion.

Appellant next argues that the admission into evidence of hearsay portions of the diagnostic study denied him due process of law and the right to confront the absent witnesses, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

Appellant complains of certain information contained in the report prepared by Joyce Talbot, Assistant Juvenile Officer of Taylor County. The report, ordered by the court, shows that the hearsay information under attack was obtained by Talbot from reports compiled by the district attorney's office. Talbot's report expressly identifies by name the persons who gave the information, and to whom the information was given.

Section 54.02 expressly provides that the juvenile court, in a waiver hearing, may consider certain hearsay reports. The waiver statute provides in part:

> (d) Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.
> (e) At the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. At least one day prior to the transfer hearing, the court shall provide the attorney for the child with access to all written matter to be considered by the court in making the transfer decision. The court may order counsel not to reveal items to the child or his parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood

of receiving information from the same or similar sources in the future.

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

(2) whether the alleged offense was committed in an aggressive and premeditated manner;

(3) whether there is evidence on which a grand jury may be expected to return an indictment;

(4) the sophistication and maturity of the child;

(5) the record and previous history of the child; and

(6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

In Matter of J.R.C., 551 S.W.2d 748 (Tex.Civ.App. - Texarkana 1977, writ ref'd n.r.e.), the appellant contended that the psychological and social reports should not have been considered by the juvenile court because they constituted hearsay, were based upon further hearsay, and were not identified or authenticated by any witness. After observing that Section 54.02(d) requires the juvenile court to order such reports, and that Section 54.02(e) specifically states that the court may consider such reports, the court said:

> Although the reports, being ex parte and made out of court, were hearsay, the legislature is free to provide for the reception of hearsay statements into evidence when it is deemed necessary, and it has frequently created exceptions to the hearsay rule for such purposes. Such an exception is particularly appropriate in a proceeding such as this, where the purpose is not to determine guilt but merely to evaluate the background and maturity of the child in order to determine if he may be rehabilitated or if he should be subject to criminal proceedings. The rules of evidence have traditionally been relaxed in proceedings concerning the welfare of children. Matter of Honsaker, 539 S.W.2d 198 (Tex. Civ.App. Dallas 1976, writ ref'd n.r.e.); Brown v. Brown, 500 S.W.2d 210 (Tex.Civ.App. Texarkana 1973, no writ); Cooksey v. Perkins, 263 S.W.2d 952 (Tex.Civ.App. Galveston 1954, writ ref'd n.r.e.); Williams v. Guynes, 97 S.W.2d 988 (Tex.Civ.App. El Paso 1936, no writ)....

After noting that the appellant had access to the reports, the court stated:

> He had notice of their identity, and pursuant to the requirements of Section 54.02(e) of the Family Code he received copies of the reports prior to the hearing. If there was doubt as to the genuineness of the reports or a need to cross-examine the authors with reference thereto, he had ample opportunity to raise the issue and call the authors as witnesses or produce other evidence bearing upon the question.

See also R.M. v. State, 563 S.W.2d 853 (Tex.Civ.App. - Austin 1978, no writ);

Matter of Honsaker, 539 S.W.2d 198 (Tex.Civ.App. - Dallas 1976, writ ref'd n.r.e.);

R.E.M. v. State, 541 S.W.2d 841 (Tex.Civ.App. - San Antonio 1976, writ ref'd n.r.e.);

Matter of P.B.C., 538 S.W.2d 448 (Tex.Civ.App. - El Paso 1976, no writ).

Appellant asserts that even though Section 54.02 permits hearsay reports, such reports violate his constitutional right of confrontation. We disagree.

The order appealed from was entered in a preliminary discretionary transfer hearing, not an adjudication hearing. Appellant's guilt or innocence was not determined. The issue for determination was whether the best interest of the juvenile and of society would be served by maintaining juvenile custody of appellant, or by transferring him to criminal district court for adult proceedings. Matter of Honsaker, 539 S.W.2d 198 (Tex.Civ.App. - Dallas 1976, writ ref'd n.r.e.).

We have found no Texas case directly in point; however, appellant's contentions were, we think, properly answered in Clemons v. State, 317 N.E.2d 859 (Ind. Ct.App. 3rd Dist., 1974) cert. denied, 423 U.S. 859, 46 L.Ed.2d 86, 96 S.Ct. 113 (1975). There the court, in a well reasoned opinion, held that in a "waiver hearing," as opposed to an "adjudication hearing," the juvenile court could consider hearsay reports without violating the juvenile's Sixth Amendment right to confrontation of witnesses. The court held that the Sixth Amendment right applies specifically to criminal prosecutions and was not applicable to a waiver hearing. We adopt the rationale and will quote freely. The court stated:

> The standard for determining what due process requires in a particular juvenile proceeding is "fundamental fairness." McKeiver v. Pennsylvania, supra, 403 U.S. at 543, 91 S.Ct. 1976; Bible v. State, supra, 253 Ind. at 385, 254 N.E.2d 319; Patterson v. Hopkins (N.D.Miss.1972), 350 F.Supp. 676.
>
> In examining the question of whether "fundamental fairness" at a juvenile waiver hearing requires the exclusion of hearsay evidence, it is important to understand the nature of the waiver hearing. Unlike the delinquency hearing, a waiver hearing is dispositional in nature. As the Supreme Court of Washington stated in State v. Piche (1968), 74 Wash.2d 9, 442 P.2d 632, 635, cert. denied 393 U.S. 1041, 89 S.Ct. 666, 21 L.Ed.2d 588 (1969):
>
> > "In determining whether the essentials of due process and fair treatment were provided in the instant case, it is important to keep in mind the exact nature of a juvenile court transfer (waiver) hearing. Such a hearing does not result in a determination of delinquency. . .; does not result in the determination of guilt as may a criminal trial; and does not directly result in confinement or other punishment as may both a delinquency hearing and a criminal proceeding. In short, the transfer hearing is not an adversary proceeding. Rather, the sole purpose of the transfer hearing, as we have recently said, is to determine 'whether best interests of the child and of society would be served by the retention of the juvenile court authority over him or whether the juvenile, under all the circumstances, should be transferred to be tried as an adult.' . . ."

See also State v. Carmichael (1973), 35 Ohio St.2d 1, 298 N.E.2d 568, cert. denied, 414 U.S. 1161, 94 S.Ct. 922, 39 L.Ed.2d 113 (1974) and State ex rel. Juvenile Dept. of Marion County v. Johnson (1972), 11 Or.App. 313, 501 P.2d 1011, rejecting the contention that a waiver hearing should be considered adjudicatory in nature....

The court continued:

> We conclude that fundamental fairness does not require the exclusion of hearsay in the waiver hearing setting. Just as in the judicial function of sentencing, consideration must be given to such factors as the previous record, background, and possibility for rehabilitation of the particular individual before the Court. The decision-making performed by the trial judge in sentencing is analogous to the waiver determination by a juvenile court judge. As we stated in Hineman v. State (1973), Ind.App., 292 N.E.2d 618, 624:
>
> ". . . The strict rules of evidence applicable during trial are no longer applicable at sentencing where the precommitment report may be a dominant influence. This basic difference was drawn by the Supreme Court of the United States in Williams v. New York (1949), 337 U.S. 241, 246-247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337:
>
> '. . . Highly relevant--if not essential--to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.'"

Other jurisdictions have considered the applicability of the hearsay rules in juvenile waiver hearings. They have concluded that such hearings are dispositional and that the hearsay rules do not apply. See In re Murphy (1972), 15 Md.App. 434, 291 A.2d 867; State v. Piche, supra; State v. Carmichael, supra.

In Clemons, a report introduced in evidence, prepared by the Porter County Probation Department, contained information obtained from the LaPorte County Juvenile Office. The court, after noting that under the rule announced in Kent v. United States, 383 U.S. 541, 16 L.Ed.2d 84, 86 S.Ct. 1045 (1966), the juvenile was entitled to see the report, said:

> The final hearsay objection involved a probation report prepared by the Porter County Probation Department. The report contained information from the LaPorte County Juvenile Office. Although the Porter County Probation Officer testified at the waiver hearing and was available for cross-examination, Clemons contends that he was denied his right to confront witnesses. As in the case of a sentencing hearing, to hold that the hearsay rules apply to exclude such evidence as psychological reports, probation reports and social reports would seriously impair the juvenile judge's ability to determine whether waiver was in "the child's welfare and the best interests of the state." Clemons is protected from consideration of erroneous reports by his right to access to such reports under Kent v. United States, supra, and by his right to present evidence of any circumstances that would entitle him to the benefits of the juvenile justice system under Summers v. State, supra. As the United States Supreme Court stated in Kent v. United States, supra, 383 U.S. at 563, 86 S.Ct. at 1058:

> ". . . (I)f the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to 'denigrate' such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is 'critically important' it is equally of 'critical importance' that the material submitted to the judge--which is protected by the statute only against 'indiscriminate' inspection--be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation. While the Juvenile Court judge may, of course, receive ex parte analyses and recommendations from his staff, he may not, for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from his staff or otherwise. The Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of the Government.

Most written reports contemplated by paragraph (d) of Section 54.02 will contain information that the reporter secures from other persons./ The reporter, Talbot, in the instant case, expressly included the source where the information came from. Joyce Talbot testified at the hearing and was cross-examined. Appellant was furnished a copy of the controversial report approximately two months prior to the transfer hearing. Appellant had ample opportunity to attack, if he chose, the uncomplimentary information contained in the report. A juvenile court may consider certain hearsay reports at a transfer or dispositional hearing that would not be admissible at an adjudication hearing. See Tyler v. State, 512 S.W.2d 46 (Tex.Civ. App. - Beaumont 1974, no writ) and Matter of A.A.A., 528 S.W.2d 337 (Tex.Civ.App. - Corpus Christi 1975, no writ) regarding dispositional hearings. Appellant's constitutional right of confrontation has not been violated.

In his last point of error, appellant asserts that subparagraphs (2) and (6) of subsection 54.02(f), by their own terms, and by the court's application thereof, presumed the guilt of appellant, contrary to his constitutionally protected right to a presumption of innocence, and due process right to be presumed innocent of the charge against him. Appellant argues that subparagraph (2) assumes that the juvenile committed the offense, and only permits the court to question whether he committed it "in an aggressive and premeditated manner." He further points out that if the statute recognized the "presumption of innocence" it would not be necessary to consider "the prospects of adequate protection of the public" and "the likelihood of the rehabilitation of the child" required in subparagraph (6) of subsection 54.02(f).

The presumption of innocence, although not articulated in the United States Constitution, is a basic component of a fair trial under our system of tribunal

justice. Estelle v. Williams, 425 U.S. 501, 48 L.Ed.2d 126, 96 S.Ct. 1691 (1976). We think that the "presumption of innocence" principle urged by appellant applies to "adjudication" proceedings, but not to "transfer" proceedings. We find the case of in Re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970), to be persuasive. In that case, the court held that the proof in an adjudication hearing must be "beyond a reasonable doubt." The court narrowed its opinion to adjudication proceedings where the accused has at stake loss of liberty and stigmatization upon conviction. The court carefully pointed out that the reasonable doubt principle would not apply to hearings prior to an adjudication hearing:

> Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing.

We point out that Section 54.03, the "Adjudication Hearing" section, expressly provides in subsection (f):

> The child shall be presumed to be innocent of the charges against him and no finding that a child has engaged in delinquent conduct or conduct indicating a need for supervision may be returned unless the state has proved such beyond a reasonable doubt. In all jury cases the jury will be instructed that the burden is on the state to prove that a child has engaged in delinquent conduct or is in need of supervision beyond a reasonable doubt.

When a court, under Section 54.02, waives its jurisdiction and transfers the juvenile to the appropriate district court for criminal proceedings, it does not determine the guilt or innocence of the juvenile. On transfer of the juvenile, an examining trial shall be conducted by the court to which the case is transferred, and such court may remand the juvenile to the jurisdiction of the juvenile court. If the case is brought before the grand jury, the grand jury may or may not indict the juvenile.

We overrule appellant's point. The presumption he urges is not applicable to the transfer hearing. See Matter of P.A.C., 562 S.W.2d 913 (Tex.Civ.App. - Amarillo 1978, no writ).

We have considered all points of error, and all are overruled. The judgment of the trial court is affirmed.

AUSTIN McCLOUD
CHIEF JUSTICE

December 14, 1978

IN THE SUPREME COURT OF TEXAS

May 30, 1979

No. B-8260

IN RE R.G.S
vs.
From Stonewall County,
Eleventh District.

Application of petitioners for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, R.G.S., Ira Wayne Swink and Marlene Swink, Guardians Ad Litem and Guardians of the Person and Estate of the Child Petitioner, and sureties, James Mack Peacock and Lyeta Dickerson,
pay all costs incurred on this application.

September 25, 1979

No. B-8260

IN RE R.G.S.
vs.
From Stonewall County,
Fleventh District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 20th day of December, 1979.

GARSON R. JACKSON, Clerk

By Mary M. Wakefield, Deputy.
Mary M. Wakefield

FILED
MAR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5837

* * *

IN RE

R. G. S.

* * *

ON APPEAL
FROM THE SUPREME COURT OF TEXAS

* * *

MOTION TO AFFIRM

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

STEPHEN G. NAGLE
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT AND AUTHORITIES	
I. THE ADMISSION IN EVIDENCE OF CERTAIN NON-EXPERT, HEARSAY PORTIONS OF THE DIAGNOSTIC REPORT DID NOT UNCONSTITUTIONALLY DENY APPELLANT SWINK DUE PROCESS OF LAW.	3
A. The Sixth Amendment does not govern a juvenile transfer hearing such as the present one.	3
B. Fundamental fairness and due process of law do not require the exclusion of non-expert, hearsay evidence in this context.	4
1. The hearing which is the subject of the present inquiry is only the first step in a three part proceeding.	5
2. The interests which confrontation seeks to protect are protected by other means in this context.	7
II. THE COURTS BELOW, IN THEIR APPLICATION OF §54.02(f)(2) and (6), TEX.FAM.CODE (VERNON'S, 1975), DID NOT DENY APPELLANT SWINK DUE PROCESS OF LAW BY PRESUMING HIS GUILT.	10
CONCLUSION	11
APPENDIX A	
APPENDIX B	

TABLE OF AUTHORITIES

CASES (Federal)	Page
California v. Green 380 U.S. 400 (1965)	8
Gault, In re 387 U.S. 1 (1967)	4
Kent v. United States 383 U.S. 541 (1966)	4,5
McKeiver v. Pennsylvania 403 U.S. 528 (1971)	3,4
Morrissey v. Brewer 408 U.S. 471 (1972)	5
Pointer v. Texas 380 U.S. 400 (1965)	3
(State)	
Honsaker, In re 539 S.W. 2d 198 (Tex.Civ.App.--Dallas, 1976) writ ref'd, n.r.e.	9
LeBlanc, Ex parte 577 S.W.2d 731 (Tex.Crim.App 1979)	6,7
Menefee v. State 561 S.W.2d 822 (Tex.Crim.App. 1977)	6,7
STATUTES	
TEX.FAM.CODE (Vernon's 1975, 1980 Supp.)	
§51.09	7
§54.02 (see Appendix B)	2,3,5,6, 7,10
TEX. CODE CRIM. PROC. (Vernon's 1977, 1980 Supp.)	
Chapter 16	
Art. 16.06	6
Art. 16.07	6
Art. 16.08	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5837

* * *

IN RE

R. G. S.

* * *

ON APPEAL
FROM THE SUPREME COURT OF TEXAS

* * *

MOTION TO AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of Texas, Appellee in the above entitled cause, moves to affirm the decision below on the ground that the questions presented are so insubstantial as to not require further argument.

STATEMENT OF THE CASE

Appellee will rely on Appellant's statement of the preliminary matters (Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved, Questions Presented, and Statement of the Case). However, Appellee wishes to point out a few additional pertinent facts. In order to place these facts in context it is necessary to briefly summarize a portion of the proceedings in the case.

On January 30, 1978, a petition alleging that Appellant, Roy Glen Swink, had engaged in delinquent conduct was filed in the District Court of Stonewall County, Texas, sitting as a juvenile court. (Transcript, page 1; hereinafter T.___) On February 22, a diagnostic study of Swink was requested. (T. 8). An order for such a study, which is required by §54.02(d), TEX.FAM.CODE (Vernon's, 1975), issued on the same day. This diagnostic report was completed on March 13 (Statement of Facts, page 169; hereinafter S.F.____) and filed along with a petition requesting the juvenile court to waive its jurisdiction. (T. 19-22). On the same day, the court set a hearing on the transfer request for March 17.

A copy of the diagnostic history was given to the attorneys for Swink on March 14. (S.F. 22-23). On March 15, Swink and his attorneys moved for a continuance. (T. 27-28). There is no order in the record showing that the hearing was reset. However, no hearing was held on March 17; and on March 28 Swink again moved for a continuance of the transfer hearing. The first paragraph of the March 28 motion indicates that the hearing was then scheduled for March 29. One of the reasons urged in support of the motion was that Swink's attorneys wanted to take the deposition of the psychiatrist who participated in the preparation of the diagnostic report. (T. 33). The motion was granted and the hearing continued until April 13. (T. 34). On April 11, Swink and his attorneys filed yet another motion for continuance. (T. 56-57). This motion was granted on April 12. (T. 58).

The transfer hearing was held on May 26, 1978. (T. 84). The diagnostic report was introduced at the hearing. (S.F. 76, 78, 99, 158-75). Appellant Swink challenges only those portions of the report which appear on pages 162-69 of the Statement of Facts. (Appellant's Jurisdictional Statement, 16-17.) The entire report is attached as Appendix A.

The diagnostic report includes summaries of interviews with various persons. All the persons interviewed are identified by name. There was no showing at the transfer hearing that Appellant Swink or his attorneys had made any attempt to contact any of the individuals interviewed. There was no showing at the transfer hearing of any reason why the persons interviewed could not have been contacted by Swink's attorneys.

ARGUMENT AND AUTHORITIES

I. THE ADMISSION IN EVIDENCE OF CERTAIN NON-EXPERT, HEARSAY PORTIONS OF THE DIAGNOSTIC REPORT DID NOT UNCONSTITUTIONALLY DENY APPELLANT SWINK DUE PROCESS OF LAW.

A. The Sixth Amendment confrontation clause does not apply to a juvenile transfer hearing.

The Sixth Amendment guarantees the right of a person accused of a crime to confront the witnesses against him or her. This right has been determined to be fundamental, and therefore applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Sixth Amendment, however, does not of its own force apply to juvenile proceedings in state courts. McKeiver v. Pennsylvania, 403 U.S. 528, 542, 554 (1971). It follows that the Sixth Amendment does not, of its own force or as made applicable to the states through the Fourteenth Amendment, require the exclusion of the diagnostic report which is the center of controversy in the present case.

This makes sense. In a juvenile transfer proceeding no life or liberty is at stake. It is not a criminal proceeding in the sense that there is no determination of guilt or innocence. At stake is the state-created right to be tried in a juvenile court rather than a criminal court. The ultimate issue to be determined is whether "because of the seriousness of the offense or the background of the child the welfare of the community requires criminal proceedings." §54.02(a)(3), TEX.FAM.CODE (Vernon's, 1975).

B. Fundamental fairness and due process of law do not require the exclusion of non-expert, hearsay evidence at a juvenile transfer hearing.

While the Sixth Amendment does not apply to proceedings such as those which are the subject of this case, the due process clause of the Fourtheenth Amendement requires that such proceedings accord a juvenile fundamental fairness and due process of law. Under the fundamental fairness analysis, juveniles have been held to have various due process rights, including the right to confrontation of witnesses in an adjudication hearing. In re Gault, 387 U.S. 1, 57-58 (1967). The fundamental fairness analysis also has led to the conclusion that a trial by jury is not required in a juvenile adjudication proceeding. McKeiver v. Pennsylvania, supra, at 548.

The same fundamental fairness analysis has been applied to a transfer or waiver hearing, such as the present one. Kent v. United States, 383 U.S. 541 (1966). Appellant relies on Kent to support the proposition that the state may not present any evidence in a transfer hearing except through direct testimony. This reliance on Kent is misplaced. Kent determined that a hearing is required in transfer situations; that juveniles have a right to counsel in such hearings; and that the court must articulate the reasons for its decision. Kent decided more, however:

> We do not mean by this to indicate that the hearing to be held must conform with all the requirements of the criminal trial or even of the usual administrative hearing; . . .
>
> With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the Juvenile Court in making its decision to waive, they must be made available to the child's counsel. . . . There is no doubt as to the statutory basis for this conclusion. . . [Emphasis added.]
>
> 383 U.S. at 562.

This brief passage makes two things clear. First, the hearing which is required in a transfer situation is not necessarily an adversary hearing in the strict, criminal sense. Accordingly, there may be a relaxation of the strict rules of evidence which apply to criminal procedings. Second, this Court implied that there was no constitutional objection to the use of hearsay testimony in the form of "social records" in such a transfer hearing. This Court noted that there was a statutory basis for requiring that the juvenile's counsel have access to these records; but it had no constitutional objection to the use of these records by the juvenile court. The situation in Texas is analogous to that in Kent. The process which is due in a transfer setting has previously been determined in Kent. It is therefore unnecessary at this time to engage in the "interest analysis" mandated by Morrissey v. Brewer, 408 U.S. 471, 482 (1972). In order to affirm this case, this court need only determine that Texas' procedures are approved by Kent. In order to decide whether the State of Texas accords juveniles fundamental fairness and due process of law under Kent, it is necessary to examine these procedures.

1. The hearing which is the subject of the present inquiry is only the first step in a three part proceeding.

§54.02 TEX.FAM. CODE(Vernon's 1975, and 1980 Supp.) provides the framework for a "Waiver of Jurisdiction and Discretionary Transfer to Criminal Court." The statute is set out in its entirety in Appendix B.

The initial, transfer hearing, at issue herein, is held before the court without a jury. §54.02(c). The ultimate issue is whether the safety of the community requires criminal proceedings. §54.02(a)(3). In making this determination,

the court is directed to consider (1) whether the alleged offense was against a person or property; (2) the aggressive or premeditated nature of the alleged offense; (3) whether there is evidence on which a grand jury may be expected to return an indictment; (4) the maturity of the child; (5) the prior behavior of the child; and (6) the prospects for adequate protection of the public and the likelihood of rehabilitation of the child through use of the facilities available to the juvenile courts. §54.02(f). The juvenile court is required to obtain a diagnostic study, such as the one which is the subject of controversy here. §54.02(d). At least one day prior to the transfer hearing, the court must provide the attorney for the child with access to all written materials to be considered by the court in making the transfer decision. §54.02(e).

If a transfer to the criminal court is approved, there is a second procedure: a mandatory examining trial. The examining trial is governed by Chapter 16, TEX. CODE CRIM. PROC. (Vernon's, 1977). The same rules of evidence apply as in a criminal trial. Art. 16.07. In the examining trial, the accused has the right to confront witnesses against him. Art. 16.08. Counsel for the accused may examine witnesses on direct or cross-examination. Art. 16.06. At the examining trial, the state must establish that there is probable cause to believe that the accused committed the alleged offenses. If the court fails to find probable cause, the accused must be remanded to the juvenile courts. Ex parte LeBlanc, 577 S.W.2d 731 (Tex.Crim.App. 1979). The examining trial is mandatory. An indictment returned before the examining trial is conducted is void. Menefee v. State, 561 S.W.2d 822 (Tex.Crim.App. 1977).

If the examining trial finds probable cause, there comes a third procedure. The accused must be indicted by a grand jury, in regular grand jury proceedings. An indictment returned against an accused juvenile after an examining trial has discharged and remanded him to juvenile court is void. Ex parte LeBlanc, supra. The only way a juvenile can waive his right to an examining trial is by written waiver or waiver in open court. §51.09, TEX.FAM.CODE (Vernon's 1975).

§54.02(g), TEX.FAM.CODE (Vernon's 1975), provides that a juvenile may not be subject to a second transfer hearing when the first transfer hearing results in a decision to retain jurisdiction. §54.02(i) provides that the criminal court "shall certify the grand jury's failure to indict to the juvenile court. On receipt of the certification, the juvenile court may resume jurisdiction of the case." Thus, a failure of evidence at either the examining trial or the grand jury level results in the remand of the juvenile to the juvenile courts. The importance of this is two-fold. First, the Texas Court of Criminal Appeals has indicated that a decision of the juvenile court to retain jurisdiction, by the criminal court that there is not probable cause, or by the grand jury not to indict, is irreversible. Menefee v. State, supra, at 828. Second, the existence of the examining trial and grand jury procedures guarantees that no juvenile will be tried as an adult unless there is significant credible and admissible evidence that he or she has committed a felony.

2. The interests which confrontation seeks to protect are protected by other means in this context.

The interests which the confrontation clause seeks to protect are basically those of accuracy and truthfulness. Absent witnesses are not under oath, are not subjected to

cross-examination, and the fact finder has no opportunity to observe their demeanor. California v. Green, 399 U.S. 149, 155 (1970). The right to confront witnesses acts a guarantee that the government will not take action which deprives an individual of liberty unless there are significant guarantees of the truth of the information on which the action is based. In the present situation, the State of Texas has provided other guarantees that an accused juvenile will not be deprived of his liberty on the basis of inaccurate information. This is all that due process requires.

The first guarantee is that the court is required to hold a hearing at which the child or his attorney may call witnesses of his own choice and present evidence of mitigating circumstances. This procedure provides an opportunity for the child to show that there are reasons why he should not be transferred from the juvenile court. In addition, Texas law specifically provides that counsel for the child shall have access to the records which will be considered by the court in making the transfer decision. Counsel for the child thus has an opportunity to examine and impeach the records.

These considerations are extremely compelling in the present case because counsel for the child had copies of the report about which he now complains two and a half months before the transfer hearing. (SF. 22-23; T. 84) The diagnostic report provides the names of all the persons interviewed, as well as those of the interviewers. If Appellant had serious objections to the accuracy of the statements contained in the diagnostic reports, he had ample opportunity to contact the persons who made the statements. He also had the right to call them as witnesses and examine them about their prior statements at the transfer hearing. The record does not show that he did either of these things.

Moreover, the evidence to which Appellant objects is of limited significance. In the transfer determination, it is of consequence only insofar as it establishes whether or not a grand jury may be expected to return an indictment. There was direct evidence as to all the other factors enumerated in §54.02(f). There was direct evidence in the transfer hearing, provided by the sheriff who investigated the crime, of the fact that the offense was an offense against persons. (S.F. 30). There was also direct evidence concerning the aggressive or premeditated nature of the crime. (S.F. 30-32). In fact, there was an opinion offered that a grand jury could be expected to return an indictment against the accused in this case. (S.F. 34-35). A portion of the diagnostic report to which Appellant has not objected provided information concerning the sophistication and maturity of the child. (S.F. 170-74). An expert witness was qualified and testified concerning her evaluation of the sophistication and maturity of the child. (S.F. 100-102). The record and previous history of the child were also provided in a portion of the diagnostic report to which Appellant has not objected. (S.F. 159-61). Finally, there was testimony at the transfer hearing concerning the prospects of adequate protection of the public and the likelihood of rehabilitation. (S.F. 104-05; 109-10; 115). There was also testimony that, among the juvenile facilities available to the court, there were none which provided a maximum security setting, or even fences. (S.F. 129-31).

In these circumstances, the credibility of the evidence to which Appellant objects is not an issue. The evidence offered goes only to show that statements have been made which support the allegations of a crime. In re Honsaker, 539 S.W.2d 198 (Tex.Civ.App--Dallas, 1976), writ ref'd, n.r.e.

This is so because, at the transfer hearing, there is only the most preliminary determination of the facts of the crime. The examining trial and grand jury procedings, which must take place before a child may be tried as an adult, guarantee that no child will be so tried unless based on admissible evidence, there is probable cause to believe that he is guilty of a crime.

II. THE COURTS BELOW, IN THEIR APPLICATION OF §54.02(f)(2) and (6), TEX.FAM.CODE (VERNON'S, 1975), DID NOT DENY APPELLANT SWINK DUE PROCESS OF LAW BY PRESUMING HIS GUILT.

The first reason why Appellant Swink was not denied due process by §54.02(f)(2) and (6), is that this is not a criminal proceding. "Presumption of innocence" is a shorthand way of saying that the state has the burden of proof in criminal matters. At a transfer hearing, there is no determination of guilt or innocence of a crime. The only determination to be made is whether the prospective trial will take place in criminal court or in juvenile court. The foci of inquiry are the safety of the community, and the resources available to deal with the child if the case is retained in juvenile court. In such a situation, the "presumption of innocence" has no application.

Even if the presumption of innocence did apply in this situation, there is no violation of it in the Texas statutes. Appellant is simply playing semantic games. It is obvious that §54.02(f)(2) and (6) merely ask the court to consider what the consequences for the general welfare would be <u>if</u> the child were found guilty of the crime. This is shown by the inclusion among the factors to be considered by the court, "whether there is evidence on which a grand jury may be expected to return an indictment." If the court is to consider <u>whether</u> there is such evidence, it cannot be presuming the guilt of the child.

Appellant points to no statement by the court or any witness, no fact established in the proceedings, nothing whatsoever which has occurred, which shows that the court ever presumed him guilty. More important, and more in line with the actual nature of the "presumption of innocence," the courts below have not ever required Appellant to either prove his innocence or suffer penalties.

CONCLUSION

The State of Texas has provided a three part procedure by which a juvenile may be transferred to a criminal court and tried as an adult. The first part of that procedure is under scrutiny here. This portion of the proceedings determines whether the safety of the public requires that the child be transferred to criminal courts for trial. Later stages, not under scrutiny here, guarantee that a juvenile will never come to trial in a criminal court unless there is probable cause to believe, on admissible evidence, that the child actually committed the alleged crime. In this case, in the first stage of this three stage procedure, the state has used a written summary of interviews with prospective, named witnesses as one means of establishing that there is evidence on which a grand jury may be expected to return an indictment. The State of Texas has provided the juvenile with an opportunity to be heard, an opportunity to view the documents to be introduced in evidence, and the opportunity of an examining trial which would more closely scrutinize the evidence concerning the crime. The conclusion is inescapable that the State of Texas has accorded Appellant due process of law.

Appellant's objection that the State of Texas, by its wording of a portion of the Texas Family Code, has presumed him guilty of a crime is meritless. The presumption of

innocence does not apply to the situation in which appellant finds himself; and even if it did the statute in question does not actually make any such presumption.

For these reasons, the State of Texas concludes that the questions raised by appellant are not substantial, and this case should be affirmed on the record as it stands.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

Stephen G. Nagle
STEPHEN G. NAGLE
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR APPELLEE

APPENDIX A

TO: Joseph Thigpen
District Attorney
39th Judicial District
Haskell, Texas

FROM: George Maxwell
Joyce Talbott
Juvenile Office
Taylor County

DATE: March 1978

SUBJECT: Roy Glen Swink

DOB: March 16, 1961

AGE: 16 years of age

NOTE: The following information was obtained from Mr. and Mrs. Wayne Swink, the aunt and uncle of the subject in an interview conducted on March 8, 1978 by Joyce A. Talbott, Assistant Juvenile Officer, Taylor County.

NATURAL MOTHER: Berta Mae Smith Swink was born October 21, 1932. After a two year period of cancer, she died September 23, 1976. Berta Mae Swink received a high school education and professed the Baptist religion.

According to Wayne Swink, she was employed by their feed store for six years as a bookkeeper. Her interests included sewing, carriage, and other artistic talents. Mrs. Wayne Swink related that she was quiet, organized and personable.

Berta Mae's first marriage was to Isiah Eddie Smith from October 21, 1949 to May 16, 1960. According to Mr. and Mrs. Wayne Swink, Mr. Smith was alcoholic. Two children, Eddie Dale and Nolan Douglas were born to this marriage. When the divorce was given to Berta Mae and Isiah Eddie Smith, custody of the children was granted to the grandparents. Mr. and Mrs. Swink were not aware of the reason why Berta Mae did not receive custody of the children.

STEP-MOTHER:

Ilke Ilene Brown Swink was 27 years of age and was born May 9, 1950. She was raised and lived in the Hamlin area, the youngest of eight children, all of her life. Ilke Ilene married Sandy Gilley on August 19, 1967. According to Mrs. Swink, she did not complete her high school education due to the fact that she married Mr. Gilley. Ilke Ilene and Sandy Gilley's first child, Sandy Shane, was born July 17, 1967. Their second child, Delinda Dawn, was born February 15, 1973. This marriage ended in divorce March 11, 1977. Custody of both children was granted Sandy Gilley and these children live in the home of their grandparents.

Ilke Ilene worked for a short period of time at the T. and J. Superette but terminated her position shortly before her death due to her pregnancy and possibly other health reasons.

According to Mr. and Mrs. Swink, Ilene was energetic, friendly and very different from H. W. Swink's first wife, Berta Mae. In describing how Ilene and Berta Mae differed in personality, the Swink's related that Berta Mae was always calm, more mature, and in control. The Swinks related that Berta Mae always put Roy in his place when she needed to do so.

NATURAL FATHER:

Herman Welon Swink is 38 years of age and was born October 6, 1939 in Aspermont, Texas. He received a high school education and professed the Baptist Religion. He worked as the general manager at Wayne Swinks Feed Store for the past eight or nine years.

According to Wayne Swink, he was friendly, energetic and aggressive. Mr. Swink was never in the service, did not use alcoholic beverages, and had never received psychiatric treatment.

His interest and hobbies were centered around his children, according to Wayne Swink, and he enjoyed working with his boys preparing stock for showing purposes.

Herman Swink's first marriage was to Berta Mae Swink on October 21, 1949. Two children were born to this marriage: Roy Glen Swink, age 16-the subject; and Royce Wayne Swink, deceased.

Mr. Swink's second marriage was to Ilke Ilene Swink on March 30, 1977. According to Mr. and Mrs. Swink, Ilene was about four months pregnant at the time of her death.

SUBJECT:

Roy Glen Swink is 16 years of age and was born March 16, 1961 in Lubbock, Texas. Mr. Swink was not aware of any severe childhood diseases or of any complications at the time of Roy's birth.

Roy was employed by his uncle, Wayne Swink, at his Feed Store and performed various duties there. He was a junior at Aspermont High School, was involved in athletics, and according to the Swinks, made A's and B's.

Mr. and Mrs. Swink related that Roy was a fast driver and had received several traffic tickets for speeding. According to the Swinks, if he had received one more ticket, he would have lost his license.

The Wayne Swinks related that Roy had been dating Betty Patton and believed that she had received a promise ring from him around Christmas. According to the Swinks, Betty was active in school, a cheerleader, and made good grades. Roy visited Betty Patton, in the hospital the night of January 23, 1978. When Roy left the hospital that night, he was of the impression that Betty Patton was pregnant because a doctor had related this information to her. Mr. and Mrs. Swink related that even though they knew that H. W. Swink had suspected that Betty Patton might be pregnant (He had previously told Roy, according to Mr. and Mrs. Wayne Swink, that if Betty ever did become pregnant that he would not help Roy and her financially or in any other way.) discovery of this situation as fact would be quite an emotional blow to H. W. Swink.

According to Mr. and Mrs. Swink, Roy always did everything very quickly and seemed to always have the desire to be "on the go". He was very organized and extremely particular.

SIBLINGS:

Royce Wayne Swink, a brother to the subject, was 14 years of age and was born April 1, 1963 at Lubbock, Texas. He was also a victim of the homicide on January 24, 1978 .

According to the Wayne Swink's, Roy and Royce were not extremely close. Both boys pursued separate and different interests. The Swink's related that after Berta Mae's death, Roy seemed to assume the responsibility of caring and looking after Royce. However, after H. W. and Ilene's marriage, this relationship ceased.

NOTE: The following information was obtained from reports compiled by the District Attorney's Office, Haskell County.

Mr. Larry Beauchamp of the District Attorney's Office, Haskell, Texas was contacted in regards to a triple homicide in Aspermont, Stonewall County, Texas. Upon entering the residence of Herman Welon Swink, the body of Royce Wayne Swink was located in the utility hallway; the body of Herman Welon Swink was observed in the front entrance hallway and the body of Ilke Ilene Swink was observed in the northeast bedroom of the residence. From the appearance of the wounds, a shotgun was used to commit the alleged offense.

Another member of the family, Roy Glen Swink, reportedly "escaped" through a bedroom window and drove to the residence of his uncle, Wayne Swink, Subsequent investigation revealed that it would have been impossible for Roy Glen Swink to have escaped through the bedroom window as he stated.

INTERVIEWS: Interview of Dr. Lesley Serrano:

Two interviews were held with Dr. Serrano, who was present and examined Roy Swink when he was admitted to the emergency room of the Aspermont Clinic, at 5:15 a.m., Tuesday, January 24, 1978. The interviews were conducted by Larry Beauchamp on January 26, 1978 and January 27, 1978.

On January 26, 1978, Dr. Serrano advised that the wound on the left upper back of Roy Swink was at an angle and was a puncture type wound. She had the impression it was made by a sharp pointed instrument of some type. Not really like a nail, but a sharp pointed instrument.

On January 27, 1978, Dr. Serrano advised that the hospital records showed Roy Swink was admitted to the emergency room at 5:15 a.m., Tuesday, January 24, 1978, at which time his blood pressure was 138/70 and observed by Mrs. Dasari, R.N., at the emergency room along with an aide, Bessie Trammell, of Jayton, Texas.

Dr. Serrano advised that she put two stiches in the left back of Roy Swink for a puncture wound. She got the impression of the wounds being in some type of pattern and was surprised that the cuts were supposed to be received from glass. She thought the patient was apprehensive but did not feel that he would actually go into shock. To her, the patient did not seem to be too upset. Dr. Serrano had the impression that the wounds were similar to a knife cut. This thought was instigated by her past experiences with drug addicts and she felt that the wounds could have been self-inflicted.

Interview of Grace Dasari, R.N.

An interview was conducted by Larry Beauchamp and Marshall Brown at 3:30 p.m., Wednesday, February 15, 1978, at Mrs. Grace Dasari's residence.

Mrs. Dasari advised that there was no bleeding present when she examined Roy Swink at the emergency room. She did not believe that the wounds on the body of Roy Swink were glass cuts. The blue jeans that Roy Swink had on appeared fresh to her.

Interview of Betty Jane Patton:

An interview was conducted by Larry Beauchamp and Ranger Marshall Brown on Saturday, 2:05 p.m., January 28, 1978, at the residence of Betty Jane Patton, approximately six miles north of Aspermont.

Betty Patton advised that on Monday, January 23, 1978, Roy Swink arrived at the Stamford Hospital at approximately 6:15 p.m. They discussed whether or not she was pregnant as her doctor had advised her that she was. Betty and Roy also discussed whether or not to tell Roy's parents. According to Betty, Roy's plans were to tell his parents about her pregnancy if they were up-or (if not) he would wait until the next morning to tell them. They did talk some about marriage.

Betty Patton related that Roy told her that when he told his parents about her being pregnant, they might get mad at first but everything would be all right.

A second interview was conducted on February 16, 1978 at 3:00 p.m. at the Stonewall County Sheriff's Office.

Betty Patton advised that her father was in the hospital in Big Springs the first week of January, and sometime in the second week of January, Roy was supposed to go with Betty to take the family automobile to Big Spring and get her mother. Her mother had requested Roy ride with her. She further stated that Roy did not get to go due to his father and when she returned on Saturday, January 7, Roy had a number of marks on his back, some whelp-type marks, and Roy advised her that his father had whipped him with some bailing wire and created the marks. Betty advised that there were approximately ten whelps and were completely across Roy's back.

Roy had told Betty on a couple of occasions that he could not do anything right and Royce couldn't do anything wrong. In H. W.'s eyes, Royce could do no wrong and Roy did everything wrong.

Interview of Kathy Maxwell:

An interview of Kathy Maxwell was conducted by Larry Beauchamp on January 29, 1978.

Kathy advised that she had heard that H.W. was going to pay for an abortion for Betty Patton if they wouldn't get married. H. W. Swink thought Roy was too young to get married, and he didn't want Roy and Betty to get married.

According to Kathy, Roy Swink did not like H.W. and Ilene getting married. She got the impression that Roy resented the marriage, although he would never say anything about Ilene, just shrug his shoulder, if asked anything about it.

Interview of Mrs. Jo McAnally:

An interview was conducted by Mr. Beauchamp on February 1, 1978 at 4:30 p.m., with Mrs. Jo McAnally at the Stonewall County Sheriff's Office.

Jo McAnally advised that Ilene was having lots of trouble with Roy. One time that she knew of, H. W. had gone out of town to a funeral and Ilene wouldn't let Roy stay out real late that night. Roy became very mad and upset about this. She knew that H. W. and Ilene had been having trouble with Roy for a period of months involving his staying out late and other problems.

Back in the summer, Roy had come to her about a job in her husband's grocery store. He wanted to leave the feed store because of an incident that happened in reference to him taking a break. Roy was high-tempered and when he came to her to talk to her about the job during the summer, he was still very upset that evening, even though the incident had occurred in the morning.

Around the first of the year, Ilene had told Jo McAnally that H. W. had advised Roy, if Betty ever got pregnant, that H. W. would not help him and Roy would have to raise it himself. Ilene related to Jo that H. W. had been out of town and come home and found Roy and Betty Patton in bed at the Swink's residence.

Jo McAnally advised during the time when Ilene was working in their store, Roy had come into the store and crossed Ilene out real badly.

On Monday, January 23, 1978, in the afternoon, Ilene came into the store and asked if Jo was going to Abilene on Wednesday, and said she wanted to go with her as they usually went together. Ilene stated that there was something that she really needed to talk to Jo about. At this time, the oldest daughter asked about Betty Patton, and he did not get much of a reply from Ilene.

Since the funeral, Betty Patton had eaten lunch with the McAnallys and made the statement that if Roy ever remembered what happened, he would be in prison for life, and if he did not remember, she did not know what might happen.

Interview of Tammy McAnally:

On Wednesday, February 1, 1978, Larry Beauchamp interviewed Tammy McAnally at the Stonewall County Sheriff's Office at 5:45 p.m.

Tammy knew that Roy and Ilene had lots of troubles. Ilene gave Royce more attention than she did Roy. When Roy Swink wanted something, he wanted it right then and didn't want to wait, according to Tammy. The implications of this interview were that Roy Swink had a volatile temper. According to Tammy McAnally, Roy and Betty had had a big fight at the homecoming and Roy had twisted Betty's arm. Roy had also become very upset one night when Betty had gone with her friends instead of going with him. To Tammy's knowledge, Roy and Betty fought every day.

Interview of Tom McAnally:

On Wednesday, February 1,1978 at 3:45 p.m., Larry Beauchamp interviewed Tom McAnally at the Stonewall County Sheriff's Office.

Tom related that he knew that Ilene and H. W. had had trouble with Roy all the time and thought that Roy probably resented Ilene. Roy Swink had talked to him about an incident that happened before Ilene and H. W.'s marriage. Roy had returned home unexpectedly and had caught Ilene and H. W. doing something. Roy had later discussed this incident with Tom McAnally and stated at that time that he guessed that they should go ahead and get married the way they were acting.

Tom related that he felt that the resentment of Roy toward Ilene started at the time before H. W. and Ilene were married and Roy caught them at the house.

Interview with Diane Lambert:

On March 13, 1978, an interview was conducted by Joyce Talbott, Assistant Juvenile Officer, Taylor County, with Diane Lambert in the Taylor County Courthouse, Abilene, Texas.

Mrs. Lambert related that she had known the late Ilene Swink around thirteen years and that Ilene had confided in her about various different matters prior to her death.

Ilene had related an incident to Diana regarding Roy and his not wishing to wash dishes one night. A system had been worked out in their home, whereby Roy would wash dishes one night and Royce would do them the next. One night, around Christmas, Roy had refused Ilene's request that he take his turn at washing the dishes. Ilene did not pursue the matter but when H.W. became involved, he insisted that Roy wash the dishes. Roy's reply was that if he had to wash the " " dishes, he would break every one of them and he proceeded to do just this.

Diane Lambert had given a baby shower for a friend and after the shower, Ilene Swink had had trouble with her car battery. Diane overheard parts of Ilene's conversation with Roy Swink and Ilene had also related parts of this conversation to Diane. When Ilene told Roy that the car battery was dead, he asked her where the "hell" she was. She then advised Roy not to talk to her that way, and to have H.W. come to the phone. Roy replied that if she wanted to talk to H.W., she would have to call back. Roy then hung up the phone. Ilene returned the call, spoke with H.W., and later H.W. came to help her with her car battery.

Diane was also aware of an incident when H.W. had taken Roy's keys away from him and given them to Ilene. This was during the time that Ilene was working at the T.&J. Superette Store. According to Diane, Roy had come to the store and asked Ilene for the keys. When she did not give them to him, Roy become upset and cursed Ilene.

Diane had heard of an incident when Roy had been requested by Ilene to clean out a closet. Roy did not comply with this request. When H.W. became aware of this incident, he and Roy become involved in a physical scuffle and H.W. knocked Roy to the floor. Diane had heard rumors that H.W. did use rather severe punishment on his kids but had never seen conclusive evidence to this effect.

Diane related that according to conversations with Ilene, everything seemed to run very smoothly in the family immediately after H.W. and Ilene married. She then got the indication from Ilene that problems had arisen between Ilene and Roy. Ilene would make concessions for Roy and in a way "tiptoe around him". Shortly before Ilene's death, Diane felt that Ilene had given up and had quit trying to make Roy pleased or satisfied with her actions because he would not respond favorably anyway.

Diane Lambert described Roy as more independent, not the type to rely on his parents or anyone else. According to Mrs. Lambert, he had owned his own car for quite some time; Roy would often go to town and eat rather than have meals with his family; and overall, he was more separated from the family, content as long as no one bothered him and he was allowed to act as he desired.

Mrs. Lambert described Roy as head-strong and determined. According to Diane, Roy would think about things before he acted and once he decided he wanted something, he would get it. She described Roy as being quiet and related that he appeared hesitant to allow social contact-that he did not encourage people talking to him, cut them off sharply if he was spoken to.

Diane related that H. W. Swink was very good to Ilene, that he seemed to place Ilene "on a pedestal". According to Diane, Royce and Ilene also got along very well and many times Royce would stand up for Ilene. Royce's attitude seemed to cause a clash between Royce and Roy.

A psychological evaluation was conducted on February 23, 1978 by Jim Ford and will be included in this Social History.

A psychiatric evaluation was conducted on March 1, 1978 by Dr. W. Kenneth Day, 270 Leggett, Abilene, Texas and will be made a part of this Social History.

A physical was performed by Dr. Irby Fox, 1227 N. Mockingbird, Abilene, Texas on March 6, 1978 and will be included in this report.

THIS SOCIAL HISTORY HAS BEEN PREPARED BY JOYCE A. TALBOT, ASSISTANT JUVENILE PROBATION OFFICER, TAYLOR COUNTY, ABILENE, TEXAS. 03-13-78.

CONFIDENTIAL

PSYCHOLOGICAL REPORT

Name: Roy Swink
Date: Feb. 23, 1978
Birthdate: March 16, 1961

Race: Anglo
Sex: Male
Age: 16
Examiner: Jim Ford

TECHNIQUES ADMINISTERED

Wechsler Adult Intelligence Scale

Verbal IQ: 97

Performance IQ: 107

Full Scale IQ: 102

Bender Visual-Motor Gestalt Test

Koppitz Score: 0 (maximum score possible)

House-Tree-Person

Minnesota Multiphasic Personality Inventory

Thematic Apperception Test

Cards 1, 1SB, 2, 14, 1SBM, 1SWF, 8BM, 12BG

Sentence Completion Test

OBSERVED BEHAVIOR

Roy is an average sized, 16-year-old, Anglo boy with moderately long blond hair, a slight moustache, and blue eyes. He appeared well coordinated and used his right hand consistently. He was very verbal and quick to respond, and as a result, a high level of rapport was easily established and maintained. On many of the tasks presented him, he asked for additional guidance, but responded quickly once the instructions were made clear. He seemed to try hard to do well throughout the evaluation, and accepted failure in a realistic manner.

EVALUATION OF TECHNIQUES ADMINISTERED

Wechsler Adult Intelligence Scale. Based on his WAIS Full Scale IQ of 102, Roy's current overall level of intellectual functioning is apparently within the Average range compared to other people his age. His Verbal I.Q. of 97 and his Performance I.Q. of 107 were also in the Average range. His Performance I.Q. was somewhat higher than his Verbal I.Q. Within the Verbal Scale he scored significantly low, relative to his

average Verbal Subtest Scale Score, on the subtest designed to measure associative thinking and general comprehension of facts acquired in the home and school. He scored significantly high on the subtest designed to measure both abstract and concrete reasoning abilities. Within the Verbal Scale he scored significantly high, compared to his average Verbal Subtest Scale Score, on the subtest designed to measure visual-motor coordination, simple assembly skills, the ability to see spatial relationships, and the ability to synthesize concrete parts into meaningful whole. This pattern of scores is sometimes seen in subjects who have a tendency toward anti-social or delinquent behavior.

WAIS subtest scale scores are listed below:

VERBAL SUBTESTS	PERFORMANCE SUBTESTS
Information - 6	Digit Symbol - 10
Comprehension - 10	Picture Completion - 11
Artithmetic - 7	Block Design - 10
Similarities - 12	Picture Arrangement - 9
Vocabulary - 7	Object Assembly - 14
Digit Span - 10	Mean - 10.8
Mean - 8.7	

Bender Visual-Motor Gestalt Test. Roy's Bender reproductions yielded the maximum score possible using the Koppitz scoring method, which suggest no significant delay in visual-perceptual-motor development. His manner of drawing the designs suggests feelings of insecurity, but overall optimism.

House-Tree-Person. Roy's H-T-P drawings are indicative of generalized anxiety and insecurity and social uneasiness. He apparently has a need to maintain an acceptable facade in interpersonal relationships, and probably feels inadequate in his attempts at close personal relationships.

Minnesota Multiphasic Personality Inventory. Roy's responses to the MMPI statements suggest slight immaturity, expecially in social contacts. He is probably somewhat suggestible and seems to have varied interests. His answers were defensive in nature and profiles similar to his have been associated with family conflict.

Thematic Apperception Test. Based on his TAT stories, Roy is mildly independent and tends to attempt to cope with his problems without external help. He also seems to be optimistic and to view things in a positive manner.

Sentence Completion Test. Home conflict was indicated in Roy's sentences and the impression of overall optimism was reinforced. His responses seemed to indicate a high respect for authority and a conformity to standards imposed on him.

Conclusions. Intellectually, Roy appears to be currently functioning in the Average range. His strongest educational asset appears to be a higher than average ability in both abstract and concrete reasoning. Overall, he does not seem to be suffering from any serious emotional difficulty, however some conflict and anxiety associated with his family relationships was evident. He is apparently independent, yet tends to react favorably to authority figures. Even though he appears currently to have feelings of insecurity and inadequacy, there appears to be an overall attitude of optimism present.

Edwin B Headrick

Edwin B. Headrick, Ph.D.
Psychologist

Jim Ford

Jim Ford, M.S. Candidate
Psychometrist

W. KENNETH DAY, M. D.
PSYCHIATRY
ABILENE, TEXAS 79605

March 1, 1978

Mr. Joe Thigpen
District Attorney's Office
Haskell County Courthouse
Haskell, Texas 79521

Re: Roy Swink

Dear Mr. Thigpen:

This is a report of a psychiatric evaluation on Roy Swink, age 16 years and 11 months. I saw Roy today with his attorney, Mr. Mike Brown, of Lubbock, Texas. Roy stated his biggest problem was attempting to understand why he is being accused. He describes himself as making good grades in school, having no problems in school, having no trouble with his family or friends. He is reasonably smart, reasonably happy, healthy, helpful, and trying hard. He dislikes his size and would like to be bigger.

He describes his natural mother as real loving, always there, and helpful. She died of cancer two years ago. He describes his step-mother as nice, liking kids, and nothing wrong with her. He describes his father as the greatest person he ever knew.

He states he was born in Lubbock, Texas, the first of two boys, and believes he was wanted. He likes outdoors and cattle, he likes westerns, and he likes sports, going out with his friends, and his girlfriend. If he had three wishes, he would (1) be a football player (2) be rich (3) have his family back together. The bad feeling he's had most often in his life is feeling sad, particularly when his mother was sick and when he hit his little brother.

He believes if everything goes wrong, he will go to prison. He believes if everything goes right, he will finish high school, go to college, get married, and live on a stock farm. He hopes to live a long life and people will remember him as having a bad childhood but doing okay.

He started to school in Rankin and remembers his first grade teacher. He moved to Aspermont in the second grade and is now a junior in high school and claims to be doing well in school, but makes some C's.

MENTAL STATUS EXAM: Roy is 5'6" and weighs 145 pounds, he has an immature beard, he has pimples, and is appropriately dressed and neat. He is oriented as to time, place, and person, there appears to be no organicity, and he complains of some headaches since being arrested. His memory is intact, he denies any physical problems, and he is not taking any medications. He has worked most of the time in a feed store. He does not attend church regularly, but believes in God. He has had no sleep disturbance, except for being in jail. He denies feeling like he was going crazy, he denies hallucinations or delusions, and denies any suicidal attempts or any homicidal ideation. At times he appears to be unhappy and at other times he is able to smile. At times he appears as if he is about to cry. He appears to be of average intelligence, his response to proverbs is appropriate, and he appears to be action-oriented. There does not appear to be any inappropriate affect and he does not appear to be psychotic at the present time.

IMPRESSION: (1) Mentally competent (2) Not psychotic (3) Average emotional development and maturity.

RECOMMENDATIONS: Further evaluation with a MMPI or complete psychological testing by Dr. Harry Martin might be helpful in assessment and evaluation. If I can be of any assistance in this evaluation, I will be happy to do so.

Respectfully submitted,

W. Kenneth Day, M. D.

WKD:ykn

cc: Dr. Harry J. Martin
270 S. Leggett Drive
Abilene, Texas 79605

OFFICE 672-7863
W. IRBY FOX, B. A., SC. M., M.D.
1227 NORTH MOCKINGBIRD
ABILENE, TEXAS 79603
RES. 672-1124

March 6, 1978

Attorney Joe Thigpen,
Box 412,
Haskell, Texas 79521

Re: Roy Swink, Box 518
Aspermont, Texas

Dear Sir:

Enclosed is a physical on Roy Swink, born March 16, 1961. Examination was done in my office on March 2, 1978.

Roy Swink is a well developed, well nourished, blond, blue eyed, light skinned, white male, who appears to be alert, intelligent and cooperative. Weight - 155 lbs. Height - 5 ft. 5½ in.

HEAD, EYES, EARS, NOSE AND THROAT: One cavity in left upper jaw teeth. Teeth good otherwise. Eyes blue - normal reaction. Vision uncorrected R 20/15 - L 20/20. Color vision normal. Ears normal. Hearing normal with tuning fork. Tonsils present. Gums normal.

NECK: Normal.

CARDIO-VASCULAR-RESPIRATORY SYSTEM: Chest and lungs - B/P 110/60. Pulse 120 regular. No heart murmurs. Chest clear to inspection, palpation and auscultation. Chest circumference - 34½ inches - 3 inches maximum expansion. Waist - 29½ inches. Hips - 34 inches.

ABDOMEN: Normal - no surgical scars. Kidneys, spleen, liver not felt. No hernia.

GENITALIA: Normal adult circumcised male genitals, with normal adult pubic hair distribution.

NEUROLOGICAL: Normal neurological findings throughout. Eye reflexes normal. Radial and ulna periosteal reflexes normal. Biceps and triceps reflexes normal. Knee and ankle reflexes normal. Coordination good - finger to nose, finger to finger bilaterally. Babinski reflex negative. Rhomberg reflex negative.

DIAGNOSIS: Normal well built, adult size, muscular white male.

REMARKS: This young man agreed to the drawing of blood from r. forearm. The arm was cleaned with alcohol, dried thoroughly with sterile sponge and approximately 15 cc of whole blood was drawn in a sterile disposable syringe and this was injected into a dry container for this purpose, furnished by Texas Ranger Brown. This container was dated, and initialed by Ranger Brown, signed by me, label covered with scotch tape, then placed in the icebox for a few minutes. It was then given to Ranger Brown when he and Roy Swink left my office.

Sincerely,

W. Irby Fox, M.D.

WIF/nn
Enc. Bill enclosed.

APPENDIX B.

This Appendix to the Motion to Affirm was not of photographic quality but can be found at Section 54.02 of the Texas Family Code (vernon's 1975 and 1980 Supp.).